

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

215
JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,384

COMMUNITY BROADCASTING SERVICE, INC.,

Appellant,

357^{v.}

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

**MORTIMER HENDRICKSON and
VIVIAN ELIZA HENDRICKSON,**

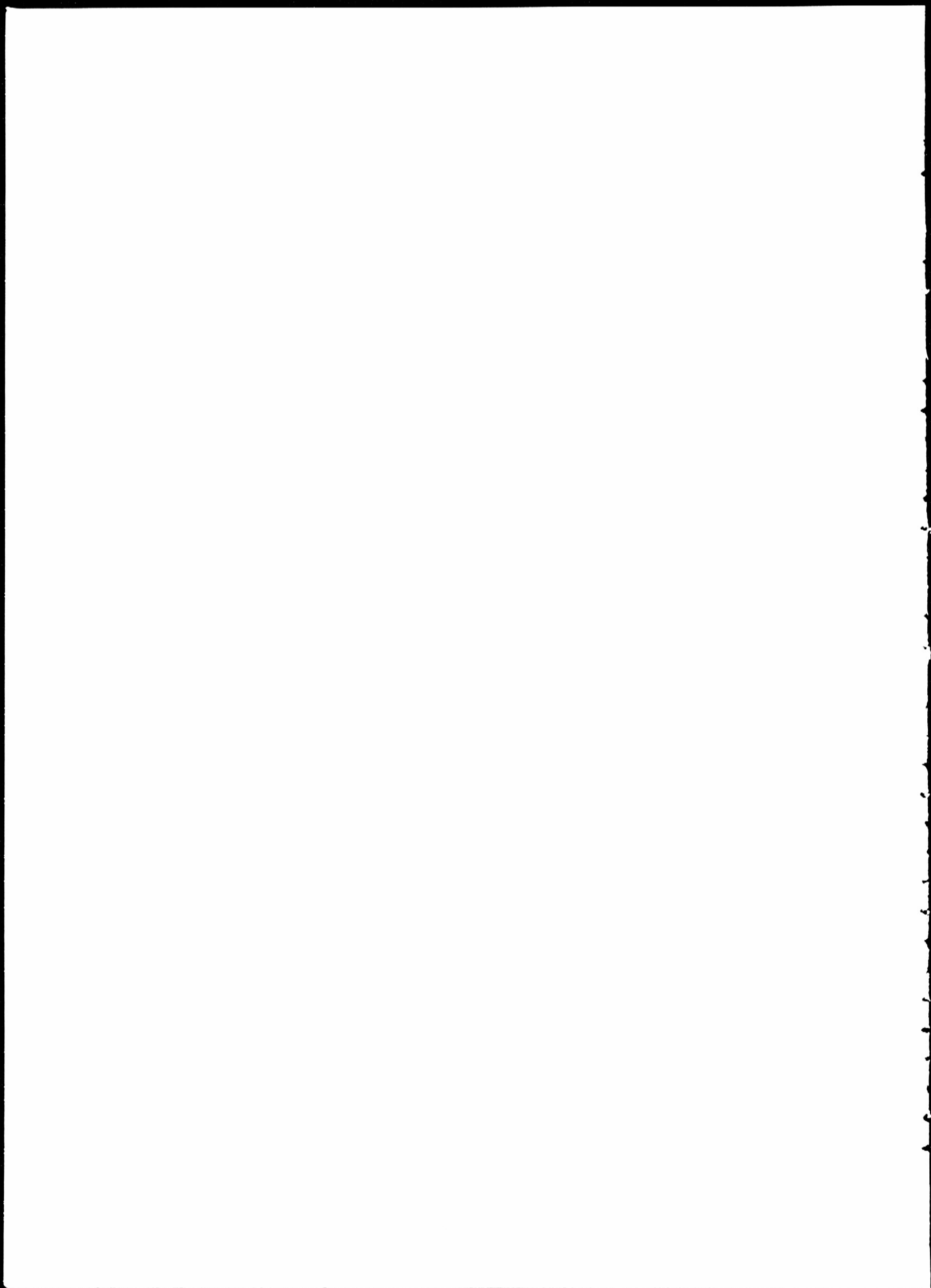
Intervenors.

**On Appeal From a Decision of the
Federal Communications Commission**

United States Court of Appeals
for the District of Columbia Circuit

FILED DEC 6 1966

Nathaniel J. Paulson
CLERK



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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,384

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v.

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Appellee,

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JOINT APPENDIX

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JOINT APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Community Broadcasting Service, Inc.	)	
Appellant,	)	
	)	
	)	No. 20,384
	)	
v.	)	
	)	
Federal Communications Commission,	)	
Appellee	)	
	)	
Mortimer Hendrickson and	)	
Vivian Eliza Hendrickson,	)	
Intervenors.	)	

PREHEARING STIPULATIONS

Counsel for all the parties stipulate and agree as follows:

The printed joint appendix will be filed simultaneously with the reply brief, or on the last day when a reply brief may be filed under the Court's Rules, and reference to the record in the briefs will be made to the typewritten pages of the record. The printed joint appendix will be numbered consecutively and the page numbers of the typewritten record will be printed in the joint appendix in bold type and indented.

The joint appendix will not contain those portions of the Notice of Appeal included in the briefs under Jurisdictional Statement, Statement of the Case, and Statement of Points.

Counsel for the parties will confer after the filing of the briefs for appellant, appellee, and intervenor, to determine whether and to what extent the facts of the case may be stipulated by the parties and printed in lieu of portions of the record on which the stipulation of facts would be based.

The parties further stipulate that in appellant's view the questions presented by this appeal are as follows:

1. Whether, in deciding a comparative proceeding between two standard broadcast station licensees upon their mutually-exclusive applications for a permit to construct a new FM broadcast station in the same community, the Federal Communications Commission may lawfully consider the hours of operation of the applicants' respective standard broadcast stations, but refuse either to draw from the facts of record ultimate findings of fact and conclusions of law on the coverage of the two stations, or to reopen the record at appellant's request to take further evidence on the coverage of the stations.

2. Whether the Federal Communications Commission may lawfully weigh against the preferential "credit" accorded appellant on the record for past and proposed "above-average public service programs" the higher degree of "integration of ownership and management" of the competing applicant.

3. Whether the Federal Communications Commission may lawfully relegate appellant's "above-average public service programs" to only a "slight preference" over its competing applicant on the ground that appellant proposed to broadcast such programs on its proposed FM station for a temporary period only, when the record shows, and two Examiners and the Commission's Review Board found, that it would broadcast such programs generally.

Appellee and intervenor do not concede any factual or legal premise implicit in the issues as formulated by appellant, and believe that the issue presented is

"Did the Commission abuse its discretion when
when it decided that on a comparative basis a grant

of intervenor's application and denial of appellant's application would better serve the public interest?"

/s/ Theodore Baron
Attorney for
Community Broadcasting Service, Inc.,
Appellant

/s/ John H. Conlin
Associate General Counsel
Federal Communications Commission
Washington, D. C. 20554,
Appellee

/s/ Benedict P. Cottone
Attorney for
Mortimer Hendrickson and
Vivian Eliza Hendrickson,
Intervenor

September 29, 1966

[Filed October 3, 1966]

Before: McGowan, Circuit Judge,
in Chambers.

PREHEARING ORDER

Counsel for the parties in the above-entitled case having submitted their stipulation pursuant to Rule 38(k) of the General Rules of this Court, and the stipulation having been considered, the stipulation is approved, and it is

ORDERED that the stipulation shall control further proceedings in this case unless modified by further order of this court, and that the

stipulation and this order shall be printed in the joint appendix herein.

[Filed August 8, 1966]

NOTICE OF APPEAL

Community Broadcasting Service, Inc., a New Jersey corporation, hereby gives notice of appeal from a Decision of the Federal Communications Commission (by its Review Board), released December 22, 1965, which reversed two Hearing Examiners and denied appellant's application for a permit to construct a new FM broadcast station at Vineland, New Jersey, and granted the mutually-exclusive application of Mortimer Hendrickson and Vivian Eliza Hendrickson, and from subsequent orders of the Commission, released May 19, 1966 and July 8, 1966, denying, respectively, appellant's Application for Review and Petition for Reconsideration of the Decision

* * * *

STATEMENT OF REASONS UPON WHICH APPELLANT
INTENDS TO RELY

1. The Commission erred in failing to give adequate and lawful consideration to the decision of the two Hearing Examiners granting appellant's application.

(a) This is especially so in the circumstances here: the Decision was issued by a staff Review Board of three members who overruled the two staff Hearing Examiners.

(b) The action of the Commission on review of the Review Board's Decision was especially erroneous with respect to the findings and conclusions of the two Hearing Examiners that a principal of appellant's opponent was not, at least in part, a credible witness.

2. The hearing and decision were procedurally erroneous, unfair, and unlawful, in that the hearing was held on issues specified under criteria for decision then existing, whereas the case was finally decided on the basis of new criteria for decision published by the Commission without rule making proceedings as "Policy Statement on Comparative Broadcast Hearings" in July of 1965 - after the hearing on appellant's application had been concluded.

3. The Commission erred in resting the decision in this case basically on "diversification" of broadcast sources in the Vineland community (under its new Policy Statement) without specifying hearing issues which would elicit the facts pertinent to such criterion of decision.

(a) On review, the Commission simply concluded that appellant was the licensee of a daytime and nighttime AM broadcast station in Vineland, that the Hendricksons were the licensees of a daytime only AM broadcast station in Vineland, and that, therefore, diversification of broadcast service would be promoted by granting the FM application of the Hendricksons rather than that of appellant. This was error because the appellant's AM broadcast station's nighttime service is so limited in geographical coverage as to be de minimis.

(b) The Review Board, in its Decision, computed the nighttime coverage of appellant's AM station but did so inaccurately and erroneously. The Commission compounded this error by refusing to accept appellant's more accurate computation or, alternatively, to reopen the record to receive full and accurate evidence on such nighttime coverage.

4. The Commission erred in that, on the one hand, it accepted the Review Board's computation of daytime and nighttime geographical coverage of the two applicants' AM broadcast stations at Vineland, and the proposed FM station at Vineland with respect to diversification but, on the other hand, refused to acknowledge that appellant's admittedly superior public service programming would be available to a new large area because there was no evidence on the matter of coverage.

5. The Commission erred and unlawfully disregarded the public interest by discounting appellant's outstanding past broadcast record because (1) appellant's principals were not sufficiently "integrated" in its AM station operation; (2) the Commission is not interested in a point-by-point comparison between the applicants but whether the station involved has been significantly above or below average; and (3) appellant engaged in several undesirable practices in its past.

(a) For all practical purposes, the Commission disregarded the fact that control of appellant was transferred in 1963 to one of its former minority stockholders.

(b) The Commission disregarded the fact that corporations operate through their Boards of Directors, and that appellant's Board of Director dictated appellant's policy.

(c) Appellant was not permitted at hearing to show by competent evidence that some allegedly undesirable practices were not true as a matter of fact.

(d) The Commission disregarded the fact that appellant's past broadcasting without technical "integration" was superior to the Hendrickson's past broadcasting with greater technical "integration," thus erroneously persisting in a rebuttable presumption despite more than adequate rebuttal of the presumption.

6. The Commission erred in holding that, under its policy (prior to the Policy Statement), its decisions established that a comparative preference accorded to past broadcast record was more than offset by a preference accorded for diversification of mass media of communications. The cases cited are factually inapplicable.

7. The Review Board's Decision was unfair and erroneous because it was colored by irrelevant but prejudicial statements. Thus:

"That Community sought to preserve its original monopoly in Vineland is, perhaps, the most salient reason for a diversification preference to the Hendricksons. However, such a preference * * * does not, rest on the fact of WWBZ's protest * * *." (Par. 11)

The Commission on review deleted the first sentence quoted above, but there are similar gratuitous prejudicial statements remaining in the Decision which adversely affected Commission review.

(a) Conversely, the Decision gratuitously favors the Hendricksons. Thus, the Decision stated that Mr. Hendrickson has familiarity with the Vineland area through operation of his AM station there "although he has no extensive record of civic participation in Vineland * * *." (Par. 20) Not only does Mr. Hendrickson have "no extensive record", he has virtually no association with Vineland.

8. Mr. Hendrickson gave testimony with respect to the method he used to prepare and broadcast certain news programs. The Hearing Examiners did not believe him and said so, but excused him generally; the Review Board erroneously exonerated him; and the Commission erroneously ignored the allegation of appellant in its Application for Review that Mr. Hendrickson could not be believed on the witness stand under oath.

9. The Commission exercised its discretion capriciously in failing to grant a "general review" of the Review Board's Decision, instead of the selective and partial review it did accord.

WHEREFORE, appellant prays that the Court enter its order reversing and setting aside the orders of the Federal Communications Commission complained of, and remanding the case to the Commission for proceedings consistent with law.

Respectfully submitted,

/s/ Arthur W. Scharfeld
Arthur W. Scharfeld

/s/ Theodore Baron
Theodore Baron

Attorneys for
Community Broadcasting Service, Inc.

1710 H Street, N. W.
Washington, D.C. 20006
August 8, 1966

* * * * *

ACKNOWLEDGMENT OF SERVICE

Receipt of a true copy of the above Notice of Appeal is acknowledged
this 8th day of August, 1966.

/s/ John H. Conlin
Associate General Counsel,
Federal Communications Commission

[50]

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

46004

B

In re Applications of)

COMMUNITY BROADCASTING SERVICE, INC.)

Vineland, new Jersey)

Req. 92.lmc, #221, 3kw, 175 ft.)

Docket No. 15265

File No. BPH-3949

MORTIMER HENDRICKSON AND VIVAN)

ELIZA HENDRICKSON)

Vineland, New Jersey)

Req.: 92,lmc, #221, 3kw, 180 ft.)

Docket No. 15266

File No. BPH-4165

For Construction Permits:)

ORDER

The Commission, by the Chief of the Broadcast Bureau under delegated authority, considered the above-captioned applications on January 17, 1964;

IT APPEARING, That the above-captioned applications are mutually exclusive in that operation by the applicants as proposed would result in mutually destructive interference; and

IT FURTHER APPEARING, That upon due consideration of the above-captioned applications, the Commission finds that pursuant to Section 309(e) of the Communications Act of 1934, as amended, a hearing is necessary; that each of the applicants is legally, financially, technically and otherwise qualified to construct own and operate the far broadcast facilities proposed:

IT IS ORDERED, That pursuant to Section 309(e) of the Communications Act of 1934, as amended, the above captioned applications ARE DESIGNATED FOR HEARING IN A CONSOLIDATED PROCEEDING at a time and place to be specified in a subsequent Order, upon the following issue:

1. To determine on a comparative basis which of the operations proposed in the above captioned applications would best serve the public interest, convenience and necessity in the light of the significant differences between the applicants as to:
 - a) The background and experience of each, bearing on its ability to own and operate the FM broadcast station as proposed.
 - b) The proposals of each with respect to the management and operation of the FM broadcast station as proposed.
 - c) The programming services proposed in each of the above captioned applications.

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2. To determine in the light of the evidence adduced pursuant to the foregoing issues which of the applications should be granted.

IT IS FURTHER ORDERED, That, to avail themselves of the opportunity to be heard, the applicants and parties respondent herein, pursuant to Section 1.140 of the Commission Rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

IT IS FURTHER ORDERED, That the applicants herein shall, pursuant to Section 311(a)(2) of the Communications Act of 1934, as amended, and Section 1.362(b) of the Commission's Rules, give notice of the hearing, either individually, or, if feasible, jointly, within the time and in the manner prescribed in such Rule, and shall advise the Commission

of the publication of such notice as required by Section 1.362(h) of the Rules.

IT IS FURTHER ORDERED, That, the issues in the above-captioned processing may be enlarged by the Examiner, on his own motion or on petition properly filed by a party to the proceeding, and upon sufficient allegations of fact in support thereof, by the addition of the following issue:

To determine whether the funds available to the applicant will give reasonable assurance that the proposals set forth in the application will be effectuated.

FEDERAL COMMUNICATIONS
COMMISSION

Ben F. Waple
Secretary

Released: January 21, 1964

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* * * * *

INITIAL DECISION OF HEARING EXAMINER
ISADORE A. HONIG AND CHESTER F. NAUMOWICZ, JR.

Preliminary Statement

1. This proceeding involves the mutually exclusive applications of (a) Community Broadcasting Service, Inc. (Community) and (b) Mortimer Hendrickson and Vivian Eliza Hendrickson (Hendrickson) for a new FM broadcast station (Class A) in Vineland, New Jersey, to operate on 92.1 mc (Channel No. 221).^{1/} By Order of the Commission released

January 21, 1964, the two applications were designated for hearing

^{1/} By definition, a Class A station in the FM service is one designed to render service to a relatively small community, city or town, and the surrounding rural area (Section 73.206(a)(2) of the Commission's Rules).

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upon standard comparative issues. In the same order, each of the applicants was found to be legally, financially, technically and otherwise qualified to construct, own and operate the respective proposed facility. Thereafter, however, upon petitions of Community, the Commission's Review Board by actions of March 27 and April 16, 1964, enlarged the issues specified in the designation order so as to add unnumbered issues concerning (1) the financial qualifications of Hendrickson and (2) the adequacy of the staff proposed by Hendrickson. As thus amended by the Review Board, the issues herein are as follows:^{2/}

1. To determine whether Mortimer and Vivian Eliza Hendrickson are financially qualified to construct and operate the FM broadcast station as proposed.
2. To determine whether the staff proposed by Mortimer Hendrickson and Vivian Eliza Hendrickson is adequate to operate their proposed FM station in conjunction with Station WDVL at Vineland, New Jersey.
3. To determine on a comparative basis which of the operations proposed in the above-captioned applications would best serve the public interest, convenience and necessity in the light of the significant differences between the applicants as to:

total sum of \$13,373.75. This amount would be payable 25% down, with the balance due in twenty-four monthly installments plus interest at 6%. Thus, Hendrickson will require \$3,343.44 for the down-payment on equipment and \$5,205.00 for payments of monthly installments and interest in the first year after delivery and installation. Of the latter amount, \$1,301.25 will be required during the first three months of operation, making a total sum of \$4,644.69 that will be needed for equipment by the end of such period. Also required to effectuate the Hendrickson proposal is the sum of \$2,250.00 for professional services. Operating costs of the combined AM-FM stations are estimated at \$18,860.00 for the first year, or \$4,715.00 for the first three months. The incremental cost to the Hendricksons of operating the proposed FM station for an initial period of three months would be \$1,350.00. The estimated cash requirement for contingencies during the first year of combined AM-FM operations is \$2,000.00. On a pro-rated basis, this item comes to \$500.00 for a 3-month span.^{5/} In total, the Hendricksons financial requirements amount to \$12,109.69 for construction of the station and combined AM-FM operations for three months. If only the additional operating costs for the proposed FM station during the initial three-month period are taken into account, then the cash requirements of the Hendricksons to construct and initially operate their FM facility would be \$8,744.69.

5. To meet the above requirements for construction of their FM station and the combined AM-FM operations for an inaugural period of three months, the Hendricksons have shown the availability of \$2,317.56 in cash and \$1,594.31 in United States Savings Bonds. In addition, the Hendricksons have a commitment from the Pitman National Bank and Trust Company of Pitman, New Jersey, for a loan of \$5,000, which loan

would be repayable within a five-year period at an interest rate of 5 1/2%. The interest is payable monthly on the unpaid balance. This interest, in the amount of \$275.00 is included in the computation of combined AM-FM operational costs for the first year (Hendrickson Exh. 2, p. 3-A).

^{4/} The partnership entity known as The Delsea Broadcasters also includes John Thomas Jones, Jr., who has an agreement with Mortimer and Vivian Hendrickson to sell his interest in the AM station to them. Mr. Jones does not participate in the operation of Station WDVL.

^{5/} Illustrative of the need to provide for contingencies is Hendricksons' plan (Tr. 2372, 2437-2438) for the expenditure of \$30.00 a month for additional maintenance work that would be occasioned by the proposed FM station.

6. Vivian Hendrickson is employed as the Superintendant of the Camden County Psychiatric Hospital at Lakeland, New Jersey. Under a Pension and Loan Fund administered by the State of New Jersey, she is entitled to borrow the sum of \$3,270.00 which would have to be repaid at the rate of \$56.81 per month plus interest at 4%. It is anticipated that Mrs. Hendrickson will borrow from this source as needed to meet the applicant's financial requirements.

7. Thus, the Hendricksons have available to them from cash on hand (\$2,317.56), savings bonds (\$1,594.31), bank loan (\$5,000), and pension fund loan (\$3,270) a total of \$12,181.87 in quick assets to cover financial requirements of \$12,109.69 for construction of their proposed FM station and the combined operation of the AM and FM stations for three months without regard to revenues.

8. There will also be available to the Hendricksons an amount of \$3,438.28 from Mrs. Hendrickson's wages for 1964 after deducting all living expenses, taxes, social security and twelve months payment on the pension fund loan contemplated by the applicant.

9. The Station WDWL operation for the year 1963 yielded a net profit of \$1,983.34, after deduction for depreciation. In view of the realization too of a net profit of \$2,342.25 from the operation of the Hendricksons AM station from January 1 through March 31, 1964, net income for the entire year of 1964 at least equal to the 1963 profit figure can reasonably be anticipated. The profitable trend for the AM operation indicated by the above-cited net revenue figures makes it evident that in fact the Hendricksons will require a lesser sum than the \$12,108.69 which was computed above under the assumption of a combined AM-FM operation without regard to revenues for either operation during an initial 3-month period.

10. On March 31, 1964, the Hendricksons were obligated to make monthly payments of \$100.00 plus interest at five percent on the unpaid balance of \$800.00 under a loan taken for the purchase of an automobile. This debt will be fully paid off by December 31, 1964. As of March 31, 1964; the Hendricksons were also obligated to make monthly payments of \$250.00 to Mr. John T. Jones under a note payable in the then outstanding principal amount of \$4,950.00. By December 31, 1964, the unpaid balance on this note will be no more than \$3,000.00, assuming the monthly payments due in the interim since March 31, 1964, have been made. The payments falling due during a 3-month period will total \$750.00. There is no evidence in the record that there has been any default in connection with the monthly installments due under the debt owing to Mr. Jones.

Finally, on March 31, 1964, the Hendricksons owed the sum of \$2,186.89 under a mortgage held by the Pitman National Bank. This obligation is payable in monthly installments of \$55.52 each, amounting to \$166.24 for 3 such payments. By December 31, 1964, the balance owing on the mortgage debt will not exceed \$1,800.00.

11. Except for one or two monthly payments made to Mr. Jones prior to 1963 which were met from "personal" funds of the Hendricksons, the monthly payments on the car loan, the debt owed to Mr. Jones, and the

mortgage obligation to the bank have been made from the revenues of Station WDWL. After December 31, 1964, the monthly payments on the mortgage debt and the obligation owed to Mr. Jones would not exceed \$1,000.00, over a 3-months period, making a liberal allowance for payment of interest on the mortgage loan.^{6/}

12. Estimated cash requirements of the Hendricksons during the entire first year of combined AM-FM operation would be \$36,124.68, consisting of down-payment for equipment (\$3,343.44), equipment payments for principal and interest (\$5,205.00), professional services (\$2,250.00), combined operational costs for twelve months (\$18,860.00), note payments to John T. Jones for twelve months (\$3,000.00), payments of the full balance due as of March 31, 1964 on an automobile purchase loan (\$800.00), mortgage payments for twelve months (\$666.24) and contingencies (\$2,000.00). Based on estimated revenues from the WDWL-AM station operation for the first year (\$27,000.00),^{7/} estimated revenues for 9 months from the FM operation (\$3,000.00), and the additional sources listed above, cash funds in the total amount of \$42,181.00

will be available to meet the above-estimated first year's requirements. Adding to the figure of \$42,181.89 the figure of \$3,438.28, representing Mrs. Hendrickson's expected wages for 1964 (less living expenses, taxes, social security and 12 months payments on the pension loan), the sum of \$45,620.15 will be available to meet cash requirements of \$36,124.68. Based on the 1963 revenues from Station WDVL and without regard to revenues from the FM operation, the Hendricksons can show the availability of \$37,301.15. As has been stated above, the figure of \$36,124.68 includes a cushion of \$2,000.00 for contingencies against which the known requirements are \$360.00 per year for added maintenance expense and perhaps \$100.00 for interest on a mortgage loan. Also, the amount of \$36,124.68 for the first year's cash requirements includes \$800.00 for car payments which in point of fact will have been met in full by December 31, 1964, so that in actuality the amount required for the first year's combined operations and other obligations of Hendricksons would at most be \$35,324.68. It is noteworthy too that the 1963 profit and loss statement of WDVL contained certain non-recurring items such as \$458.95 for repainting building and legal and audit fees of \$797.30 which arose from a protest proceeding. These figures, if eliminated from estimated combined AM and FM operational expenses for the first year, would result in a further and proportionate reduction of the \$35,324.68 figure stated above.

^{6/} The record does not reflect whether the monthly payments of \$55.52 on the mortgage debt include the interest.

^{7/} WDVL revenues for 1963 were \$21,681.00. The AM revenues in the first quarter of 1964 were \$6,858.15, and on an annual basis the revenues from WDVL-AM alone could, therefore, be expected to be on the order of \$27,000.00

Adequacy of Hendricksons' Staff Proposal

13. Station WDVL is a standard broadcast station operating daytime only with 500 watts power and with a 2-tower directional antenna system. The FM station proposed by Hendrickson involves the use of a 1 kw transmitter in a non-directional operation. The AM and FM facilities of Hendrickson will be operated under a combined studio-transmitter physical layout. The proposed FM antenna will be mounted on one of the two AM towers which are a few hundred feet away from the studio-transmitter building.

14. The present AM facility of the Hendricksons operates on a schedule from 8:45 a.m. to 4:45 p.m., seven days each week. It is proposed, pursuant to the instant application, that the FM station would operate daily from 8:45 a.m. until 11:00 p.m., with the exception of Sunday when 8:30 a.m. will be the starting time. During the simultaneous operation of the stations, the programs would be duplicated.

15. The present staff of Station WDVL consists of Mr. and Mrs. Hendrickson^{8/}, a full-time announcer (Henri Morey), two part-time announcer-engineers (Earl Godfrey and George Pepper), and two part-time salesmen (Gordon Page and J. Hamell) who are employed on a commission basis. Occasionally, a standby engineer-announcer (Gary Cresse) is employed as summer vacation relief, or on weekends. He is not a regular station employee.

16. The Hendricksons propose a staff of eight persons to operate the combined AM-FM facilities, plus an additional "standby engineer-announcer" who will be available on weekends. The names of these individuals and their schedule of working hours are found in Hendrickson Exhibit 3 entitled "Personnel Schedule for WDVL AM-FM."^{9/} As shown by Hendricksons' personnel

8/ Mrs. Hendrickson prepares and presents on the air a weekly children's program, and does administrative and clerical work for the station

9/ This schedule is divided into three shifts for each day: (1) the period from 7:00 a.m. to 8:45 a.m., when only the FM station will operate; (2) the period from 8:45 a.m. to 4:45 p.m., when there will be simultaneous operation of both the AM and FM facilities carrying the same (duplicative) programming; and (3) the period from 4:45 p.m. to 11:00 p.m., when only the FM station will be on the air.

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schedule, Mr. Hendrickson, who holds a third class radio-telephone license with a broadcast endorsement, will devote a minimum of 50 1/2 hours per week to administrative, engineering, announcing and sales duties. He will do announcing on a regular basis and in relief. From 7:00 a. m. to 8:45 a. m., Mondays through Saturdays, and on Sunday from 8:30 a. m. to 8:45 a. m., the times in the morning when only the proposed FM station will be on the air, Mr. Hendrickson will perform engineering and announcing duties for a total of 10 1/2 hours a week. From 8:45 a. m. to 4:45 p. m., Mondays through Sundays, Mr. Hendrickson will devote a minimum of 32 hours a week to announcing, engineering, sales and relief work. In this period, Mondays through Fridays, Mr. Henri Morey, the full-time announcer, will be on duty a total of 36 hours 10/ performing announcing, programming, and clerical duties. In the same period, each day of the week, two part-time, first-class engineers will perform engineering and announcing duties for a total of 56 man hours weekly. One of the two first-class engineers, Mr. Earl Godfrey, will work Monday through Wednesday. The other engineer, Mr. George Pepper, will work Thursday through Sunday. Mr. Godfrey has 43 years of experience in radio engineering and broadcasting, and he has worked in AM, FM and TV stations, at times serving as a chief engineer. He has been employed by the Hendricksons for a period of six years. Mr. Pepper has worked in

broadcasting as station engineer for at least twenty years. One additional person will be at Station WDVL in the period between 8:45 a. m. and 4:45 p. m. on Saturdays and Sundays, namely, Mrs. Hendrickson who will devote a minimum of 8 hours doing administrative work, programming (including the Children's Story Window-a one-half hour Saturday program), clerical ^{11/} work and relief announcing.

17. In the period from 4:45 p. m. to 11:00 p. m., Mondays through Sundays, when only the FM station will be on the air, an announcer-engineer (Mr. Gordon Page on Mondays through Wednesdays and Mr. J. Hamell on the remaining days) will be on duty each day performing engineering and announcing duties, for a total of 43 man hours; in addition, Mr. Hendrickson will be on hand during this time segment for a minimum of eight hours weekly, performing relief engineering and announcing duties, and Mrs. Hendrickson will also be on hand a minimum of eight hours weekly, performing clerical and relief announcing and relief engineering duties. Thus, a weekly total of 202 1/2 man hours of service as a minimum, will be available for the proposed combined operation which will have a weekly broadcast schedule of 110 1/2

^{10/} On Thursday, he will be off duty after 1:00 p. m.

^{11/} Although the Hendricksons do not anticipate the FM operation would make it necessary to hire additional clerical help it is contemplated that a relative of theirs will assist them as a clerk-typist under a part-time paid arrangement in the event the need should arise (Tr. 1323). The personnel schedule makes no provision for such help.

hours. In addition, as has been the case in the past, a first class engineer (Mr. Gary Cresse) will be available on weekends, and will be used on a standby basis for engineering and announcing duties. Mr. Francis Fekel who has a first-class engineering license, is also available for weekend duty. One of the regular first class engineers is available on short notice for emergency or standby duties in the evenings or on days when he is not normally on duty at WDVL. For outside sales work, the Hendricksons will use two part-time salesmen on a straight commission basis.

18. The record describes in considerable detail the manner in which each person engaged in the combined station operations and FM only operations would perform required duties under the schedule outlined above. During the early morning periods when only the FM station will be in operation, Mr. Hendrickson will perform the duties of putting the station on the air, announcing, playing records, making required observation readings of the transmitter and studio equipment controls and making required entries on the program log and the FM transmitter log. In the evening periods when the FM operation only is on the air, an announcer-engineer will perform the same duties but for a minimum of sixteen hours a week, he will be assisted or relieved, if necessary, by Mr. and Mrs. Hendrickson. The record shows that other stations in the area and elsewhere operate with a single announcer-engineer on duty performing all these required functions either during an FM only nighttime operation or an AM only nighttime operation.

19. During the daily period of combined AM-FM operations WDWL will have, Mondays through Fridays, the services of qualified first-class engineers with many years of experience in broadcasting. During this daily period, the station will have the services of an experienced announcer and Mr. Hendrickson himself for on-the-air and associated duties. On Saturdays and Sundays, when the hired announcer is not on duty, the first class engineer will be on duty during the period of combined operations, and Mr. and Mrs. Hendrickson will handle the same functions which are performed by the announcer and Mr. Hendrickson during the other (Monday-Friday) days. The added duties required by the FM operation consist of the required readings and observations with respect to the FM operation and the making of entries on a separate FM transmitter log. A single program log will be maintained for both the AM and FM duplicated programming and the separate FM programming. The first class engineer now makes the entries in both the AM transmitter

broadcasting as station engineer for at least twenty years. One additional person will be at Station WDVL in the period between 8:45 a. m. and 4:45 p. m. on Saturdays and Sundays, namely, Mrs. Hendrickson who will devote a minimum of 8 hours doing administrative work, programming (including the Children's Story Window-a one-half hour Saturday program), clerical ^{11/} work and relief announcing.

17. In the period from 4:45 p. m. to 11:00 p. m., Mondays through Sundays, when only the FM station will be on the air, an announcer-engineer (Mr. Gordon Page on Mondays through Wednesdays and Mr. J. Hamell on the remaining days) will be on duty each day performing engineering and announcing duties, for a total of 43 man hours; in addition, Mr. Hendrickson will be on hand during this time segment for a minimum of eight hours weekly, performing relief engineering and announcing duties, and Mrs. Hendrickson will also be on hand a minimum of eight hours weekly, performing clerical and relief announcing and relief engineering duties. Thus, a weekly total of 202 1/2 man hours of service as a minimum, will be available for the proposed combined operation which will have a weekly broadcast schedule of 110 1/2

^{10/} On Thursday, he will be off duty after 1:00 p. m.

^{11/} Although the Hendricksons do not anticipate the FM operation would make it necessary to hire additional clerical help it is contemplated that a relative of theirs will assist them as a clerk-typist under a part-time paid arrangement in the event the need should arise (Tr. 1323). The personnel schedule makes no provision for such help.

hours. In addition, as has been the case in the past, a first class engineer (Mr. Gary Cresse) will be available on weekends, and will be used on a standby basis for engineering and announcing duties. Mr. Francis Fekel who has a first-class engineering license, is also available for weekend duty. One of the regular first class engineers is available on short notice for emergency or standby duties in the evenings or on days when he is not normally on duty at WDVL. For outside sales work, the Hendricksons will use two part-time salesmen on a straight commission basis.

18. The record describes in considerable detail the manner in which each person engaged in the combined station operations and FM only operations would perform required duties under the schedule outlined above. During the early morning periods when only the FM station will be in operation, Mr. Hendrickson will perform the duties of putting the station on the air, announcing, playing records, making required observation readings of the transmitter and studio equipment controls and making required entries on the program log and the FM transmitter log. In the evening periods when the FM operation only is on the air, an announcer-engineer will perform the same duties but for a minimum of sixteen hours a week, he will be assisted or relieved, if necessary, by Mr. and Mrs. Hendrickson. The record shows that other stations in the area and elsewhere operate with a single announcer-engineer on duty performing all these required functions either during an FM only nighttime operation or an AM only nighttime operation.

19. During the daily period of combined AM-FM operations WDWL will have, Mondays through Fridays, the services of qualified first-class engineers with many years of experience in broadcasting. During this daily period, the station will have the services of an experienced announcer and Mr. Hendrickson himself for on-the-air and associated duties. On Saturdays and Sundays, when the hired announcer is not on duty, the first class engineer will be on duty during the period of combined operations, and Mr. and Mrs. Hendrickson will handle the same functions which are performed by the announcer and Mr. Hendrickson during the other (Monday-Friday) days. The added duties required by the FM operation consist of the required readings and observations with respect to the FM operation and the making of entries on a separate FM transmitter log. A single program log will be maintained for both the AM and FM duplicated programming and the separate FM programming. The first class engineer now makes the entries in both the AM transmitter

log and the AM program log, but Mr. Hendrickson is able to make the entries on the program log. During the period of the combined operation, two people will always be on duty to handle the engineering, announcing, and the other on-the-air duties. There are at least three sponsored programs, totalling 9 1/2 hours weekly, in which staff personnel is relieved of duties such as playing of records, announcing, and broadcasting of spot announcements; namely, Voice of the Caribbean, one hour daily, Mondays to Fridays, and 1 1/2 hour on Sundays; Yiddish Language Hour, 1 hour on Sundays; Ray McDaniel Show (called "Sunday Morning" and "Spirituals" in Hendrickson Exhibit 8), 1 1/2 hours on Sundays.

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20. There are fourteen other programs in the proposed Hendrickson schedule which are continuous in nature^{12/} and similarly relieve staff personnel of announcing and other associated duties that would otherwise be required by the interspersed spot announcements. Another factor which will ease the physical burdens of the WDVL operating staff is the composite arrangement of the studio-transmitter layout for the proposed operations - the console, turntables, transmitter, phase monitor, base currents and frequency control, and clock are all placed within direct and convenient range for playing of records, announcing, making log entries, viewing of readings and the making of necessary adjustments.

21. There was testimony by Community's consulting engineer, Mr. Jules Cohen, that, in his opinion, certain maintenance procedures were necessary in the operation of a broadcast station, over and above certain procedures specifically required by the Commission's Rules (Tr. 2060-2084). It was his opinion further that for the combined operation proposed by Hendrickson (i.e., directional operation of the AM station and a non-directional FM station) a minimum maintenance schedule of eight hours a week is essential for proper maintenance. Part of this schedule (about six hours), it was advocated by Mr. Cohen, should be in the "experimental"

period, namely, from midnight to 8:00 a. m. He estimated that about two-thirds of the 8-hour maintenance schedule would be devoted to studio equipment. This witness spelled out in detail what maintenance measures are to be carried out in accordance with his concept of required minimum maintenance for Hendrickson's proposal. While Mr. Cohen conceded that he has not inspected Station WDVL's facilities, he evinced familiarity with their technical specifications as set forth in pertinent applications among the Commission's records.

22. No Commission rule requires any specific number of hours per week be devoted to maintenance, nor is any particular time specified in the rules for the accomplishment of maintenance functions. ^{13/} Maintenance work is now done at Station WDVL by the station's first class engineers both during operation and when the station is off the air. Currently the engineer who is to be on duty for the day arrives at

^{12/} These uninterrupted programs (listed in Hendrickson Exh. 8) are: Songs of Faith; 20th Century Reformation Hour; Report from Rutgers; Speaking Acquaintance; How New Jersey Grows; Discussion by the Governor; Viewpoint; Vistas from Israel; Here's to Veterans; Country Church; Vineland Methodist Church; World Affairs; The Afterglow; and Voice of Hope.

^{13/} The NAB Engineering Handbook does not specify any amount of time for maintenance; neither does any other source material mentioned in the hearing. (Tr. 2160-2163).

the station fifteen minutes before broadcasting commences and performs some maintenance in that interval. During the course of the broadcast day, maintenance checks are made. Tape recorders are cleaned once a week and sent out periodically for overall maintenance. The record does

not show that the Hendrickson station now has any particular schedule for maintenance work performed during each week. Except for maintenance done in the daily period of fifteen minutes before air time, the periods of time devoted to the AM station maintenance requirements by WDVL personnel is not reflected in the evidence. Thus the total number of man-hours spent on WDVL maintenance cannot be determined.

23. To accomplish the additional maintenance entailed by the proposed FM operation. Hendrickson plans to contract out such work to a first class engineer who would spend about two hours a week between 11:00 p. m. and 2:00 a.m. on his duties. Arrangements for this maintenance assignment have been discussed with two first class engineers both of whom will be available and one of whom will be engaged for \$30.00 a month. The maintenance contemplated by Hendrickson was discussed with his first class engineers and his standby first class engineer (Gary Cresse) who advised him that it was adequate for the proposed combined operation. None of the three past FCC inspections of WDVL has resulted in any citation or criticism of the station for failure to carry out proper maintenance procedures. During the course of the past two years Station WDVL has been forced to go off the air for a total of about one and one-half hours. One occasion, which accounted for 1 1/4 hours of silence, was caused by failure of power supply. On another occasion, a four minute silence resulted from the necessity of making a tube replacement. The third occasion, a three minute or so silence, was occasioned by the making of a tube adjustment. None of these silences was attributable to a lack of proper maintenance. Mr. Hendrickson has relied on his experience with the operation of Station WDVL as well as the advice of his own engineers in arriving at his belief that the maintenance to be performed with regard to the combined AM-FM operations will be adequate. In the past, Mr. Hendrickson has discussed over the telephone maintenance problems with an engineering consultant in Washington but he did not elicit an opinion from this source on the question of

the adequacy of the provisions for maintenance made by Hendrickson for the combined operation.

The Community of Vineland

24. Vineland, New Jersey, is located in Cumberland County, in southern New Jersey, about 30 miles west of Atlantic City and the same distance south of Philadelphia. The City has a population of 38,690 (1960 census), and has the largest area of any city in New Jersey (68 square miles). It is governed by a Mayor and a City Council under the so-called "Faulkner Plan" which provides for separate departmental directors with the Mayor functioning as the chief administrative executive over them. Vineland is economically based on both agriculture and industry. Vineland and the surrounding area constitute a leading egg and poultry producing area and a center of truck farming. In addition, more than 100 manufacturers and processors have their headquarters in Vineland. Principal industries include glassware, clothing, chemicals, metal products, fireworks, fertilizers, poultry equipment, paper, and concrete.

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Vineland has 17 elementary public schools, 4 elementary parochial schools, 2 public junior high schools, 1 senior public high school, and 1 parochial high school. The city provides a school bus system for transportation for all children requiring such service. There are 40 houses of worship in Vineland representing most religious creeds and denominations. The Spanish Catholic Center serving the Spanish speaking residents (about 1500 persons) and migrants in South Jersey is located in Vineland. The City has a recreation commission which administers a year-round program of sports and hobbies for young people and senior citizens. It has a public library, a Y.M.C.A., a Little Theater, and civic and fraternal organizations including Kiwanis, Rotary, Lions, Exchange, Soroptimists, and Junior and Senior Chambers of Commerce. The Newcomb Hospital - a 160-bed facility serving the Vineland area-

is located in this city. Vineland has three media of mass communications; The Vineland Times-Journal, a daily newspaper; Radio Station WNBZ, (1360 kc, 1 kw power, directional antenna at night); and Radio Station WDV, (1270 kc, 500 watts power, daytime only, using directional antenna).

Community Broadcasting Service, Inc.

Corporate Organization

25. The officers, directors, and stockholders of Community are as follows: (Community Ex. 8)

<u>Name & Residence</u>	<u>Office</u>	<u>Com. Stock</u>	<u>Pfd. Non- Voting Stock</u>	<u>% of Vot- ing Stock</u>
Joseph M. Bullock Milmay, N. J.	President Director	200	77	20.0%
Lewis D. DeMarco Vineland, N. J.	Vice-Pres. Director	515	135	51.5%
Ernest A. Zucca Vineland, N. J.	Treasurer Director	25	25	2.5%
Moey L. Lihn Vineland, N. J.	Secretary Director	50	50	5.0%
Lemuel R. Newcomb Vineland, N. J.	Director	20	20	2.0%
Henry T. Bullock Vineland, N. J.	_____	95	98	9.5%
Roy Yates Port Norris, N. J.	_____	20	20	2.0%
Estate of Peter Levari	_____	50	50	5.0%
Estate of John J. Daneri	_____	25	25	2.5%
Totals		<u>1,000</u>	<u>500</u>	<u>100.0%</u>

Background of Principals

26. Joseph M. Bullock, President, a Director, and 20% voting stockholder in Community, has resided in Vineland most of his life. From 1919 to 1960, Mr. Bullock owned and operated an automobile agency in Vineland with his brother, Harry Bullock. In 1959 Mr. Bullock suffered injuries in an automobile accident and retired from business in 1960. He still owns and rents out commercial properties situated in Vineland. Since 1959, Mr. Bullock has been away from the Vineland area and in Florida approximately six months each year. He receives the daily Vineland newspaper even when he is absent from the area. Mr. Bullock is a member of the Elks Lodge in Vineland, the Atlantic County Game Preserve in South Jersey, a part owner of the Lenape Preserve in South Jersey, a part owner of the Lenape Preserve and Breeding Association (in Atlantic County which adjoins Cumberland County), a member of St. Mary's Church in Milmay, New Jersey, nine miles from Vineland, and he is a member and supporter of the Milmay Fire Company. He now lives in Milmay.

27. Lewis D. DeMarco, Vice-President and a Director of Community, has been the controlling stockholder of Community, owning 51.5% of the voting stock, since February 1963. He has been a stockholder in the WWBZ licensee since 1946 when the station was authorized. Mr. DeMarco is a native of Vineland who was educated in the Vineland public schools and attended business school in Vineland. He has been engaged in the real estate business in Vineland since 1928 and has been sole owner of his own realty firm since 1943. He is a member of the Moose Club, Assistant Commissioner of the Boy Scouts (South Jersey Division), President of the Holy Name Society, a member of St. Isadore's Parish, all in Vineland, New Jersey. He is a former member of the Elks Lodge and the Navy Club. Mr. DeMarco is also a Director and stockholder of the Vineland National Bank and of the Vineland Savings and Loan Associa-

tion, Past President of the Main Avenue Fire Company of Vineland, and has served on the Newcomb Hospital Board of Trustees in Vineland for two terms. He is a member of the South Jersey Development council for the promotion of industry in South Jersey. He served four years as a member of the Vineland City Council, 1956-60; he is a Past President of the New Jersey Farm Brokers Institute and a former Secretary of the Cumberland County Realtors Association. During World War II, Mr. DeMarco was a member of the U. S. Coast Guard Temporary Reserves. He resides in Vineland with his wife and daughter.

28. Moey L. Lihn, Secretary, a Director, and 5% voting stockholder of Community, has resided in the Vineland area since 1906. Mr. Lihn has lived in Vineland since 1917. He is sole owner of Tri-State Transportation Company of Vineland which operates sixty pieces of trucking equipment and employs 110 people, 80 of whom are Vineland residents. Mr. Lihn is Past President and a member of the Beth Israel Synagogue in Vineland, Past Master of Brotherhood Lodge 292 (Masonic Order) of Vineland, Past President and still member of B'nai Brith Lodge; Board Member and Treasurer of Chevra Kadisha Cemetery, Association of Norma, New Jersey (3 miles from Vineland); Member of Delta Nu

Alpha Transportation Fraternity, Inc.; presently a member of and Past Exalted Ruler of Elks Lodge, Vineland; Member of the Diamond Social Club which does charitable work; Member of the Recreation Club which also engages in charitable activities; Past Chief of Transportation for Evacuation in Case of Disaster, Vineland. Mr. Lihn has been on the Board of Directors of the Newcomb Hospital for 16 years, serving as its Vice-President for the past ten years. He also is Chairman of the Joint Conference Committee of the Hospital. He served with the Coast Guard for approximately 2 years during World War II.

29. Ernest A. Zucca, Treasurer, a Director, and 2.5% voting stockholder in Community, has lived in Vineland, New Jersey, since the age of seven. He owned and operated a bakery in Vineland from 1916 to 1955, when he retired. The business was founded by his father in 1896 and is now operated by Mr. Zucca's sons. Mr. Zucca served for 14 years (until 1954) as Treasurer of the Vineland Chamber of Commerce. He is a member of the Sacred Heart Church in Vineland, the Loyal Order of Moose in Vineland, North Italy Club of that city; New Italy-America Society in Vineland, a former member of the Masonic Lodge, and he was a member of the New Jersey State Guard in World War II. On April 25, 1964, the Fraternal Order of Eagles in Vineland presented an award to Mr. Zucca and the Mayor of Vineland conferred upon him the key to the city in recognition of his distinguished service to the community through participation in hospital, bond and Red Cross drives, among other noteworthy activities. Mr. Zucca currently lives in Vineland except when he vacations in Florida for approximately three months in the year.

30. Lemuel B. Newcomb, a Director and 2% voting stockholder in Community, has lived since 1918 in the Vineland area, where he was engaged in the oyster shucking business until 1948 as a partnership member. He employed approximately 300-500 persons in his business. The oyster blight affecting Delaware Bay currently prevents his engaging in the oyster business but he intends to participate in the oyster industry when the adverse conditions are overcome. Mr. Newcomb is a member of the Masonic Order, Elks, and the Methodist Church, all of Vineland. He is also a member and a Past President of the Cumberland County Shrine Club. Mr. Newcomb resides in Vineland but spends a few months each winter in Florida.

Community's General Manager

31. Robert C. Crager is the General Manager of Community. He was born in Schenectady, New York in 1925. After graduating from high

school at Merchantville, New Jersey, in 1942, he studied radio technique in New York City in the same year. His first job in radio was that of an announcer in the fall of 1943 at Station WSNJ, Bridgeton, New Jersey, which is 11 miles from Vineland. Mr. Crager served in the Army of the United States in World War II. After the surrender of Japan, he served as an announcer at Station WVTR in Tokyo, Japan, until he was discharged from the service in 1946. He was employed as an announcer at Station WBRY, Waterbury, Connecticut, from 1946 to 1947, and as an Announcer-Program Director for Station WSNJ, Bridgeton, New Jersey, in 1947. From late 1947 until 1958 he was Announcer, Program

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Director, Manager, and Vice-President of Station WWCO at Waterbury, Connecticut. Between 1958 and 1961, Mr. Crager was a part-time announcer with the Community station WWBZ in Vineland. He was appointed General Manager of Community in 1961. He has continued to serve in that capacity at Station WWBZ to the present time. He attends meetings of the Board of Directors which are held twice monthly and prepares the minutes of these Board proceedings. The Board receives oral reports from him on various station matters as well as programming suggestions and other recommendations. Mr. Crager is a Vice-President of the Kiwanis Club of Vineland and resides at Bridgeton, Cumberland County, New Jersey.

32. Community submitted no biographical evidence for its stockholders Henry T. Bullock (owner of 9.5% voting stock) and Roy Yates (owner of 2.0% voting stock), and no showing was made as to the extent of their participation in the affairs of the licensee of Station WWBZ.

Participation of Community Stockholders

33. Supervision of the day-to-day operations of WWBZ has been delegated by the stockholders of Community to the General Manager, Mr. Crager, who is neither a stockholder nor a director of this licensee.

Those stockholders of Community who serve on the Board of Directors - five in number - meet with Mr. Crager twice a month when the Board convenes. On these occasions, they hear reports from him on the station's operations, discuss program policies and programming, personnel, equipment, contracts and other subjects concerning the station with him, and receive his recommendations and suggestions. Mr. DeMarco, the majority stockholder, and Mr. Moey Lihn have regularly attended the Board meetings for the past three years; Mr. Zucca and Mr. Newcomb have fairly high records of attendance for the same period, and Mr. Joseph M. Bullock has attended 3 or 4 meetings per year on an average. When Mr. Bullock (who has been the president of Community ever since it was organized) is in Florida, Mr. DeMarco keeps in touch with him by letter or telephone with reference to station business.

34. Mr. DeMarco's real estate business office is about 2 1/2 miles from Station WWBZ. Mr. Crager stops by DeMarco's office on an average of three times a week to discuss such station matters as suggestions for new programs, personnel, advertising accounts and occasionally engineering. The vice-president also keeps in touch almost daily by telephone with Mr. Crager concerning station activities. Mr. DeMarco visits the station on the average of twice a week to check on the station facilities and on the personnel. He listens to the broadcasts of Station WWBZ while in his car or at his home. DeMarco receives copies of all correspondence between the station and its Washington counsel. At various times, Mr. Crager needs Mr. Lihn's signature on station payroll checks. Also, Mr. Lihn and Mr. Crager meet about three times a week for about five or ten minutes at the Vineland Post Office when both men go there to pick up mail. On these occasions,

they have discussions which serve to keep Mr. Lihn abreast of station developments and the latter passes on programming suggestions to the

general manager. When he is at his home in Milmay, Mr. Bullock, president of Community is visited by Crager once or twice a week to obtain his signature on station checks. Except for Board meetings, Mr. Bullock and Mr. Lihn seldom visit the station.

The Reasons Underlying Community's FM Application

35. The submission of Community's application for an FM station was motivated by a desire to improve the Station WWBZ signal at night, to overcome man-made interference in Vineland adversely affecting the AM daytime operation, to provide certain musical and other programming different from that being offered on the existing AM station of Community, and to accommodate the demand for FM service arising from the increasing rise of FM receivers by the radio audience. Station WWBZ presently provides interference-free daytime service to distances of from almost fifteen to twenty miles from the transmitter and interference-free nighttime service to distances of about five miles from the transmitter. The coverage map for the proposed FM station of Community shows that it will provide interference-free service, daytime and nighttime to an area within a uniform radius of about forty miles from the transmitter.^{14/}

Community's Proposed FM Programming

36. Prior to the filing of Community's application on November 16, 1962, Mr. Crager discussed the programming for the proposed FM station at meetings of the Board of Directors. It was decided that initially the programming of existing station WWBZ would be duplicated on the FM station but that some unduplicated programming would be inaugurated on the FM facility when its equipment was operating in accordance with the Commission's technical standards. Specifically, music on Sunday evening and "finer music" than on the AM station during the periods from 3:05 p. m., to 6:00 p. m. and 8:05 p. m. to 11:00 p. m. Mondays through Saturdays. Community submitted no proposed

program schedule with its instant application. The applicant did state in the application that in its initial stage of operation the existing program schedule of WWBZ would be duplicated in its entirety. Community further stated that "at the same time" WWBZ-FM will aim to develop a separate and independent FM programming designed for a separate FM-only audience. The applicant also asserted: "Community already projects that at some practicable time following the establishment of the FM station it will commence

^{14/} The issues specified for hearing in this proceeding do not require a comparison of the coverage to be achieved under the respective FM proposals of these applicants. However, the Examiner has permitted a showing by each applicant as to the improvement coverage under the related FM proposal as compared with the existing AM coverage of such applicant.

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separate FM programming in the area of music. In doing so, WWBZ-FM will emphasize semi-classical or classical music during certain evening and nighttime hours in place of the more popular variety of music generally presented on WWBZ." (Community Application, Exhibit 3). The percentage analyses of programs included in Community's application were based on a schedule of programs being carried on Station WWBZ in September, 1962. The particular percentages were computed by counsel for Community. A proposed typical week's program schedule was not prepared until early in 1964, at which time a schedule (Community Ex. 3) was drawn up by Community's general manager.^{15/} He presented the proposed schedule to the Board of Directors at a meeting in February, 1964; Mr. DeMarco and Mr. Lihn were the only directors present. The Board approved the proposed schedule without making any change.

37. The proposed FM program schedule of Community (Community Exhibit 3) provides for the duplication of Community's AM program-

ming with the following exceptions: on Sundays, from 7:00 to 8:00 p. m. the FM station will carry "Music You Want", a program of recorded classical music; on Mondays through Saturdays, from 3:05 p.m. to 6:00 p. m. most of this period will be devoted to "Theater of Beautiful Music", a program of recorded semi-classical music; and on Mondays, Wednesdays and Fridays, from 8:05 p. m. to 11:00 p. m. the station will air "Music of the Masters", a recorded program of classical music interrupted only by news and weather reports. On Tuesdays^{16/} and Thursdays from 8:05 p. m. to 11:00 p. m. the FM station will present "Symphony Hall", a program of recorded symphonic music. During this time period on Saturdays, classical music programs entitled "Great Moments in Music" and "Musical Showcase" will be broadcast. All of the new FM programs will be in lieu of popular music programs now being heard on the AM station of Community. It is proposed to inaugurate the non-duplicative FM programs as soon as a license is issued for the FM facility (Tr. 190-196).

38. While there will be a limited offering of non-duplicated programming on the FM station after the license has been issued to Community, its declared intention is to develop separate and independent programming for a separate FM only audience. This aim will be pursued by advertising and promotion of the relatively static-free and interference-free qualities of FM broadcasting, and of FM-only programs as they are introduced on Station WWBZ-FM. However, no time-table has been proposed for the commencement of additional non-duplicative programming. Generally, Community will duplicate on its FM station local

^{15/} The record does not show whether the proposed schedule was prepared by Crager before or after the date on which Community's FM application was designated for hearing, namely, January 17, 1964.

^{16/} On the second and fourth Tuesdays of each month, the meetings of the Vineland City Council will be broadcast live at 8:00 p. m.

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programs in the fields of discussion of public issues, education, religion, agriculture and special events. When two events in these fields occur simultaneously, the FM station will broadcast one event while the AM station will broadcast the other.

39. The proposed program schedule of WWBZ-FM runs from 7:53 a. m. to a few minutes past midnight on Sundays and from about 6:00 a.m. to the same sign-off time on all other days of the week. Analysis of the proposed typical week's schedule by types of programming reveals the following percentages:

Entertainment	70.0% (Approx)
Religious	6.8%
Agricultural	1.9%
Educational	1.2%
News	10.0% (Approx)
Discussion	.7%
Talks	9.4%
Total	<u>100.0%</u>

40. Analysis of the proposed Community FM programming schedule by class of programs yields the following data:

	<u>8 a. m.- 6 p. m.</u>	<u>6 p. m.- 11 p. m.</u>	<u>All other hours</u>	<u>Total</u>
RC	69.4%	25.6%	26.3%	50.4%
RS	3.6%	62.0%	64.3%	29.4%
WC	2.1%	2.9%		2.0%
WS	9.3%	3.8%	9.8%	7.8%
LC	12.6%	0.7%		7.3%
LS	<u>2.9%</u>	<u>5.0%</u>		<u>3.0%</u>
Tot. Coml.	84.1%	29.2%	26.3%	59.7%
Totl. Sust.	<u>15.8%</u>	<u>70.8%</u>	<u>74.1%</u>	<u>40.2%</u>
	100.0%	100.0%	100.0%	100.0%

	8 a. m.- 6 p. m.	6 p. m.- 11 p. m.	All other hours	Total
B/C hrs.	70	35	19	124
SA	325	225	175	1225
NCSA	90	60	30	150

41. As shown in the weekly broadcast schedule proposed for Community's FM station (Community Exhibit 3), there will be numerous entertainment programs of varying musical content presented. On Sunday, for example, Polka Hop, a recorded program of polka music, will be broadcast from 12:05 to 1:00 p. m. Between 1:05 p. m. and 5:30 p. m. on Sunday, Community will air Sunday Showcase, a recorded session of popular tunes and light semi-classical music interrupted by some headlines and weather on the half-hour. Between 6:00 p. m. and 7:00 p. m. on Sundays, there will be presented the Kirby Carmichael show (a "disc jockey" program) followed from 7:00 p. m. to 8:00 p. m. by "Music you Want", consisting of symphonic music records. From 8:30 p. m. to 8:45 p. m., Waltz Time will be broadcast, and from 9:15 p. m. to 9:30 p. m. a program of transcribed folk music called World of Folk Music will be presented. On Mondays through Fridays, commencing from 6:00 a. m. and continuing intermittently to 9:55 a. m., WWBZ-FM will carry the Lee Bardsley Show, a morning "wake-up" entertainment program of recorded popular music for adult listeners. From 11:05 a. m. to 12:30 p. m., Mondays through Fridays, Community will present the Bob Marek Show, consisting of a recorded music program featuring a station personality, Bob Marek. The program Polka Hop would occur from 1:05 to 1:30 p. m., and at various intervals between 1:32 p. m. and 3:00 p. m., a recorded "adult" oriented musical program will be available. On Saturday mornings, there will be a morning entertainment program similar to the Lee Bardsley Show in content but featuring a different announcer, under the program title of Early Birds Get Together. Again, on Saturday from

11:05 a. m. to 12:15 p. m., the Bob Marek Show of popular music will be broadcast. From 12:30 p. m. to 1:00 p. m. Country and western style music on records will be played on Mountain Music Boys. For the better part of the time segment between 1:05 p. m. and 6:00 p. m. on Saturday, recorded popular music will be aired under the titles of Record Room and Silver Platter.

42. Community proposes the following religious programs on Sundays: Chestnut Street Assembly of God, conducted by a Vineland Minister from the WWBZ studio, and presenting recorded music with religious comment, from 8:00 a. m. to 8:30 a. m.; Ava Maria Hour, a transcribed Catholic program, from 8:30 to 9:00 a. m.; Bridgeton Unionaires, live program of spiritual music, from 9:00 to 9:30 a. m.; The Bible Speaks to You, a transcribed program made available by the Christian Scientists, 9:30 to 9:45 a. m.; Song Time, essentially religious music program furnished by a Baptist Church organization from 10:00 to 10:30 a. m.; Voice of Israel, a live program from the studio based on various aspects of Hebrew religion, from 10:30 to 11:00 p. m.; Church Service of Covenant Orthodox Presbyterian Church, a remote religious broadcast from a church in Vineland, from 11:00 a. m. to 12:00 noon; and Father Wm. J. Reynolds, a Catholic religious program in Spanish language originating from the studio in Vineland, from 5:30 to 5:45 p. m. On weekdays (Monday through Friday) from 8:05 to 8:30 a. m., the Faith and Life Hour will be a remote broadcast from the pastor's study at the Presbyterian Church in Vineland; from 9:25 to 9:30 a. m., the program of Hymn Time will be broadcast; and from 7:15 to 7:30 p. m., there

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will be broadcast the Sacred Heart Program, a transcribed Catholic program, with the Family Rosary (recitation of the Holy Rosary) to be presented on Tuesdays. On Saturday this time segment will present a religious program in Spanish originating from the Vineland Spanish Pentacostal Church.

43. The Agricultural programming of Community's FM station will include: How N. J. Grows, on Sundays from 9:30 to 9:45 p. m., concerning agriculture as it affects the State of New Jersey; and Farm and Poultry Hour, Mondays through Fridays, 12:35 p. m. to 1:00 p. m. providing information of interest to poultry farmers and to persons interested in raising various farm crops. On Wednesdays, this program will be presented by the assistant Cumberland County Agricultural Agent except for quotation of current egg prices.

44. Educational programs proposed by Community are: Still More Manpower, on Sunday, 5:45 to 5:55 p. m., a program furnished by the American Foundation for the Blind; Report from Rutgers, on Sunday, 9:00 to 9:15 p. m., a report on activities at the state university; Speaking of Schools, on Monday, Wednesday, and Friday, from 6:05 p. m. to 6:10 p. m., dealing with all aspects of the educational system in New Jersey; and The Added Years, on Thursday, from 6:45 p. m. to 7:00 p. m., concerned with problems of older people. On the third Sunday of each month, All America Wants to Know, a program on current events, is broadcast from 10:00 to 10:30 p. m. Each Monday evening from 6:45 p. m. to 7:00 p. m., the station will air Men and Molecules, furnished by the American Chemical Society.

45. The proposed program schedule for WWBZ-FM includes frequent news and weather reports every day. A total of approximately 12 hours of news will be programmed each week. Community uses the Associated Press wire news service, regularly checks for local news items with governmental, hospital and other sources in Vineland, and employs a wire Weather Service that supplies agricultural and radar weather reports from Philadelphia, Atlantic City and New York City as well as from the various weather stations in the entire state of New Jersey. The Reynolds Stock Market Report, a remote program originating in the Vineland office of a stock brokerage firm, is scheduled from 12:20 to 12:25

p. m., Mondays through Fridays. On these same days, the Robert St. John Commentary presenting topical items from various travel points, will be broadcast from 2:00 to 2:05 p. m. On Mondays through Fridays, at 5:05 p. m. to 5:10 p. m., Closing Stock Prices will be broadcast.

46. Discussion programs of Community will include: Rutgers University Forum on Sunday, 8:00 p. m. to 8:25 p. m., a program furnished by the University and presenting invited guests dealing with a variety of public issues; and Vineland City Council Meeting, a live broadcast of City Council meetings twice each month (Tuesdays, from 8:00 to about 9:00 p. m.).

47. Talk programs of this applicant will be Sound-Off, Monday through Friday, between 10:00 and 11:00 a. m., consisting of phone calls from the public to the station announcer, the conversations being broadcast

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as they occur. Public issues are discussed regularly, and government officials as well as representatives of various civic groups in the Vineland area also participate. This program is now carried on the AM station of Community, and leading Vineland public officials have appeared on this program in the past. Another talk program will be Community Calendar, Monday through Friday, 5:10 p. m., to 5:15 p. m., presenting notices of various meetings and events in and about Vineland. Such announcements are also interspersed among other programs throughout the day. Other talk programs to be carried will be: a fifteen-minute Governor's Report on Wednesday evening, a fifteen minute Senator's report on Friday evening, and a fifteen-minute presentation of comments by the president of the Vineland Branch of the N.A.A.C.P.

Policy

48. Community proposes to make sustaining time available to candidates for public office, and will affirmatively seek out such candi-

dates to participate in political discussion and talk programs. Only on rare occasions will time be sold for talks by candidates, although spot announcements will be sold to them. This policy has prevailed in the past license period of the AM station. Community will also extend its broadcast facilities to all ethnic, religious, civic, and fraternal organizations by means of invitations to the staff and officers, a policy that has been followed in the AM operation.

Past Programming of Station WWBZ

49. Some sixteen witnesses representing various governmental, church, school and public service groups and organizations in Vineland and its vicinity, appeared at the hearing on behalf of Community to testify concerning their needs for broadcasting facilities and their use of the AM facilities of Community. As established by the testimony of the individuals named below, the following are the facts as to the extent of "public service" programming carried by Station WWBZ in the past with regard to certain activities in Vineland and which programming Community would include in its FM broadcast schedule: (a) The Mayor of Vineland, Henry A. Garton, Jr., often has need for broadcasting facilities for emergencies and to discuss questions of government and other problems. He appears regularly on Station WWBZ on the "Sound Off" program (10:00 a. m. to 11:00 a. m.) on the second and fourth Wednesdays of each month. These are the days following the meetings of the City Council. On the program, the Mayor answers questions telephoned in by the public concerning such things as the City Council meetings, traffic problems, school safety, road construction, among other topics. When the City has a problem, such as snow removal, and would like to get information to the public, the City normally calls Station WWBZ and asks for time. When there are controversial subjects, the Station frequently has offered the use of its facilities. Station WWBZ has never refused any time requested by the Mayor; (b) The Vineland Chapter of the NAACP had need for the use of broadcast

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facilities to enlist support for the purposes and objectives of the organization, which include education on the plight of Negroes in America with respect to housing, employment, and voter registration. The NAACP has used the facilities of Station WWBZ on a weekly program from 6:45 to 7:00 p. m. Friday evenings. Mr. Cavini Andro, the president, and, alternately, Mr. Herbert Douglas, Chairman of the Publicity Committee of Vineland NAACP Chapter, broadcast general news in the field of civil rights, talk with various community leaders, and give commentaries on local and national situations. The program is sustaining, and Station WWBZ supplies tapes and the use of the studio for recording the programs in advance. The program was initiated by Station WWBZ three or four years ago; (c) The Director of Civil Defense and Disaster Control in Vineland, James A. Marcacci, heads an organization there which has a rescue squad, a police reserve, and a city fire department in event of disaster. The organization has need for the use of broadcasting facilities to alert the city in the case of disaster. The Director has used the facilities of Station WWBZ: In 1960, he used Station WWBZ to give the population instructions in connection with a hurricane; in 1961, he appeared on an interview program on WWBZ in a discussion of hurricanes (there is a hurricane season each year); and in 1962, a program was broadcast concerning the general role of the civil defense program. On March 9, 1962, Station WWBZ called the Director in connection with a bad storm on the Atlantic seaboard. The Station remained on the air night and day to keep the people informed of conditions along the Atlantic seaboard. The Director broadcast from the studio and also via telephone. The organization also used Station WWBZ in 1962 to help search for a missing six-year-old child. This programming continued over seventy-two hours. From time to time, the Director has also notified people by means of Station WWBZ of state exercises conducted by his organization. The rescue squad has used the station to help conduct membership drives;

(d) The Vineland Recreation Commission provides a year-around program of recreation for youth and adults, and the organization has need for the use of broadcasting stations to keep the public advised of the Commission's daily programs and to make announcements of cancellation of programs because of inclement weather. The Commission has used Station WWBZ to announce its programs in the City of Vineland, especially during the football league schedules to aid in finding places for visiting teams to stay. The Superintendent, Chester J. Hilger, has appeared on WWBZ to explain to teenagers the Commission's program available to the youth of Vineland; (e) The Cumberland County Superintendent of Schools, William D. Fenton, has general supervision over public education in the County. He has need for the use of broadcast facilities to announce closings of schools because of bad weather, to publicize work with parent-teacher associations, and to give information to the public concerning a county junior college program. Since Mr. Fenton took office on July 1, 1960, WWBZ has been used to announce school closings and to broadcast numerous spot announcements for the parent-teachers association of the county. He has personally appeared on the "Sound-Off" program in 1964; (f) The Superintendent of Schools of Vineland, Victor Podesta,

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since January 1, 1964 has used the facilities of Station WWBZ at its invitation to publicize information concerning a problem of bus transportation for school children. He was in daily contact for a week or two with the Station answering questions and making statements to the public through the Station by telephone. A meeting of the Board of Education was held on the same subject and the program was taped and broadcast by Station WWBZ in January of 1964. The program was broadcast live and a tape was made which was prepared for the use of the Board of Education. The Vineland school system broadcasts school

closings due to storms and emergencies, changes of school hours, registration, PTA programs and special events such as school concerts and athletic contests, (g) The Director of the Spanish Catholic Center at Vineland, Father William J. Reynolds, heads a corporation set up primarily for the spiritual, moral, educational, and economic welfare of Spanish speaking people in the area. The Center has immediate contact in the area with approximately 1,500 people, and also has contact with migrants who come into the area of South Jersey. The Center has a very important need for the use of broadcasting facilities which affords the sole means of communication with those Spanish-speaking persons it seeks to serve. Father Reynolds has used Station WWBZ exclusively; he has four programs weekly on the Station. One program goes back to 1959, and the other three programs started in 1961. A Sunday program is broadcast from 5:30 to 5:45 p. m., and other programs are broadcast on Monday, Wednesday, and Friday, from 7:15 to 7:30 p. m. Usually, Father Reynolds broadcasts the programs live at the studios of Station WWBZ; (h) Sacred Heart High School in Vineland has need for broadcasting facilities for the same general reasons as public high schools - for closings, for announcements of the High School itself, for special events, and for Parent-Teachers Association announcements. Occasionally, the Sacred Heart Church has need for announcements concerning special events. Father Flemming, Assistant at the Church and Administrator of the High School has used Station WWBZ exclusively for such announcements since he assumed his present position in 1961. Station WWBZ regularly has broadcast the basketball games of the High School. Father Flemming has also used Station WWBZ in his capacity as Director of the Catholic Youth Organization for Cumberland County, appearing in the fall of 1962 on the "Sound-Off" program; (i) The President of the Cumberland-Salem Chapter of the Muscular Dystrophy Association, Thomas M. Dell, and his Campaign Chairman, have used Station WWBZ for the past 8 years in publiciz-

ing fund-raising drives in November of each year. They have taped 5-minute releases and programs for the station; (j) The Board of Freeholders of whom Mr. Peter Marcacci is a member, manages and operates Cumberland County. This organization has used the broadcasting facilities of Station WWBZ, for example, in 1963 and 1964 the Board of Freeholders requested WWBZ to announce which roads would be opened or closed because of snow, and Station WWBZ has always been contacted whenever emergencies required the use of a radio station. In February of 1964, the Board of Freeholders had an open hearing on a County College, which was held at Cumberland County Courthouse, Bridgeton, New Jersey; Station WWBZ carried spot announcements concerning the meeting; (k) The Veterans of Foreign Wars of Vineland, of whom Mr. Marcacci is a Past Commander, has used the facilities of Station WWBZ exclusively in connection with a drive for funds for an ambulance in 1962, in connection with a building-fund drive in 1962, and in connection with informing teenagers of dances held on Friday nights by the organization; (l) The Main Avenue Fire Company of Vineland, a working Volunteer Fire Department to which Mr. Marcacci belongs, has used Station WWBZ in past years to carry spot announcements for classes teaching safety practices and for publicizing fund-raising events held by the

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organization; (m) The Vineland Training School, whose Publicity Director is Thomas J. Fanning, is a non-profit organization for the care, treatment, and research of the mentally retarded. In December 1963, the Training School produced a phonographic record to demonstrate the ability of the retarded children to perform, and Station WWBZ provided technical assistance for the half-hour recording and also broadcast the program. On occasion, children have strayed from the School grounds, and the School has broadcast descriptions of the children over Station WWBZ to help find them. The Station has also broadcast spot announce-

ments of the fund-raising events conducted by the School on four occasions each year; (n) The Newcomb Hospital in Vineland, serving 60,000 people in the area of Vineland, used Station WWBZ exclusively to raise funds for the addition of a new wing in 1960. In 1957 or 1958, Station WWBZ came to Newcomb Hospital and broadcast a twelve-hour program on which guests and the hospital personnel were interviewed. People called in and gave pledges to the hospital during "Operation Newcomb." Station WWBZ has also participated in a subsequent fund drive beginning in November of 1963. The Administrator, James R. Pepper, appeared on the "Sound Off" program twice to explain the fund drive and the activities of the hospital, and to describe the new building plans. He also made spot announcement tapes at Station WWBZ for the hospital, in connection with the "United Fund," in 1962 and 1963. The Hospital has used Station WWBZ to solicit blood donations, and the Red Cross has used Station WWBZ for its monthly blood bank efforts which also benefit this hospital; (o) The Deputy Chief of Police of the Vineland Police Department, in Charge of Traffic, Mr. John Barsaglia, has used Station WWBZ (for eight years) since he took charge of traffic. He has made approximately four to six recordings at the station yearly for broadcast pertaining to traffic, parking regulations and disaster regulations. Instructions have also been given by him to the public concerning emergencies, hurricanes, bad storms and blocked-off roads. Station WWBZ also advertises special events of the Fraternal Order of Police, along with a safety program put on by the organization. Whenever the Police Department is ready to change speed limits on streets and roads in the area, the public is notified of the change by announcements on Station WWBZ. The Department's Safety Patrol Director has made recordings at WWBZ several times to broadcast to parents and children pertinent

facts about traffic safety; (p) The Fire Department of Vineland, consisting of five volunteer companies and employees, has used the facilities of Station WWBZ exclusively. The Station has always afforded the Department time on the air to advertise its volunteer functions, and has cooperated with the Fire Department in connection with seasonal fire hazard and emergency announcements; (q) Rev. David Bailey is a Methodist preacher and the Director of Ranch Hope for Boys, Alloway, New Jersey, which is engaged in the rehabilitation of delinquent boys. Station WWBZ helped to provide publicity for the building of Ranch Hope for Boys which started plans and fund-raising in the middle of 1962. The station through its General Manager, approached Rev. Bailey about the work, and subsequently interviewed him on "Sound Off." This was followed by a number of spot announcements publicizing the fund-raising program; (r) The Vineland Chamber of Commerce, through its Executive Director Murray Sternberg, has used the facilities of Station WWBZ, which is a member of the Chamber of Commerce, to advertise annual projects, and special programs, of the Chamber. The Station also tapes and broadcasts the annual dinner meeting of the Organization. The

annual projects include "Paint-up, Clean-up Week," "Fire Prevention Week," "The Christmas Parade," the "Mardi Gras Parade," and an "Action Course in Politics." For these, the Chamber mails releases to the Station, and these releases are broadcast on the following mornings, approximately 9:00 and 11:00 o'clock.

Composite Week Analysis:

50. The statistical data concerning WWBZ's past performance record is as follows:

1963 Renewal Application

<u>Subject Matter</u>			<u>Source</u>
Entertainment	71.8%	NC	0.5%
Religious	8.6%	NS	
Agricultural	2.6%	RC	65.9%
Educational	.9%	RS	14.3%
News	11.0%	WC	2.9%
Discussion	.7%	WS	7.4%
Talks	4.4%	LC	3.8%
		LS	5.2%
		Tot. Coml.	73.1%
		Tot. Sust.	26.9%
		B/C	124
		SA	1206
		NCSA	271*

* Average of 30 "Bulletin Board" Announcements not included in total "NCSA."

Composite Week for 1964 Renewal Applications
(1963 Composite Week)

Analysis of Subject MatterAnalysis of Source

<u>Type</u>		<u>Source</u>	
Entertainment	72.11%	RC	60.05%
Religious	7.92%	RS	18.17%
Agricultural	1.88%	WC	2.83%
Educational	1.25%	WS	7.25%
News	11.20%	LC	9.27%
Discussion	.34%	LS	2.42%
Talks	5.26%		
		Tot. Coml.	72.15%
		Tot. Sust.	27.84%
		B/C hours	124
		SA	974
		NCSA	301

Proceedings on WWBZ Renewal Application

51. In 1952, the Commission instituted proceedings on the license renewal application of Station WWBZ to determine whether a further grant of its operating authority would be in the public interest. The hearing was designed to elicit the facts and surrounding circumstances as well as the effects of the broadcast of horse racing information by the station. Following hearings, the Commission, on November 28, 1955, denied the renewal application (Community Broadcasting Service, Inc., 13 R.R. 179). The Commission found that the station broadcast race information daily on three programs which were scheduled in a time segment occurring in the afternoon, Monday through Saturday. It was concluded by the Commission (13 R.R. 193): that the broadcast of horse race information by Station WWBZ was used by persons engaged in illegal gambling activities, that the directors of that station neglected their responsibilities which in effect were transferred to the station manager who, in turn, was indifferent to the public interest problem presented by the broadcast of the information in question; that there was a complete failure of the licensee to ascertain and take appropriate action respecting the true nature of the listening interests being served by its broadcast of horse racing information; and that the licensee thus failed to carry out its responsibilities. The Commission found too that the station was, and had been neglectful, of certain types of programs and that proper consideration had not been given to the needs of the Vineland area in the matter of educational, discussion and agricultural programming particularly.

52. Following the release in November, 1955, of the Commission's decision denying Community's renewal application, pleadings and requests were filed by this applicant seeking various relief concerning the

Commission's action. In October, 1956, the Commission vacated and set aside its prior decision insofar as it denied the renewal application, and remanded the proceeding for supplemental hearing under the originally designated issues to afford the applicant an opportunity to make an additional showing under those issues, with particular reference to the station's management and program policies, as well as its overall performance, since the original hearing was concluded in October, 1954. It was found in a Supplemental Initial Decision (Community Broadcasting Service, Inc., 14 R.R. 1215, 1224 (1957)) that "drastic changes" had occurred in the station's programming and overall operation: the former station manager and the former program director had terminated their services with WWBZ, there had been for the past two years no improper delegation of authority to the station manager, all broadcasts of horse racing information had been discontinued, and the licensee had made a diligent effort to provide the Vineland area with a wholesome service responsive to its programming needs. Renewal of the license as ordered in the Supplemental Decision was approved by the Commission by its Order of May 15, 1957 (14 R.R. 1226). The record in the instant comparative hearing contains no evidence that the horse racing programming which had resulted in the license renewal hearing, has been broadcast by WWBZ since the extension of its license in 1957.

Spot Announcement Practices:

53. The WWBZ renewal application for 1960 stated that the practice with respect to spot announcements would be that, "generally," not more than four spot announcements, none to exceed one minute in length, would be carried in 14 1/2 minute segments. In the composite week analyzed for the 1963 renewal application, fifty segments of 14 1/2 minutes were reported in which five or more spot announcements were broadcast.

A recount showed there were actually fifty-two segments. Of these, six spots were carried in eighteen segments, seven in four segments, and eight in one segment.^{17/} For the same week, WWBZ reported, in the 1963 renewal application, 117 segments of 14 1/2 minutes with no spots or commercial continuity. This was revised at the hearing down to 111 segments, and the evidence showed that some of these segments contained commercial continuity for sponsored programs. It has been the station's practice to "double" spot and "triple" spot, namely, broadcasting one minute spots in succession. Thus, on a composite week day, April 26, 1962, from 7:30 p. m. to 8:00 p. m., there were one minute spots at 7:35 and 7:36, at 7:41, 7:42, and 7:43, at 7:47, 7:48, and 7:49, and at 7:53 and 7:54. In the composite week day of January 23, 1962 additional examples appear in the 7:30 to 8:00 a.m., 8:30 to 9:00 a. m., 10:00 to 10:30 a. m. (three double spots), and 10:45 to 11:00 a. m. segments. The practice of carrying more than four commercial spots in some of the 14 1/2 minute segments has continued since the 1963 renewal application was filed. The log for Thursday, June 20, 1963, a composite week day, shows several segments with five or more spots. The increased demands from sponsors for advertising time on Thursdays and Fridays, and before certain holidays or certain special events has caused Station WWBZ to exceed the four spots for a 14 1/2 minute programming segment. Heavy commercial requirements also occur in the so-called "drive-time" periods: in the seven to nine a. m. broadcasting segment and in the four to six p. m. segment. The station's policy is to limit its commercial spot announcements to one minute each which in practice has meant that such announcements were kept to 120 words in length or less. Mr. Crager constantly checks the content of commercial spot announcements to assure that they do not exceed the 120 word limitation.

Logging Practices:

54. Promotional spot announcements aired by Station WWBZ relating to commercially sponsored broadcasts of basketball and football games have been mislogged as non-commercial spot announcements. This was done on one entire day of the 1962 composite week, five days of the week October 15-21, 1962, and on a day in the 1963 composite week. In a number of instances in one day, the mislogging was apparent when the general manager was himself announcing the commercial promotions. Promotional announcements broadcast on January 23, 1962,

17/ Hendrickson Exhibit 12.

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relating to a sponsored basketball game carried by Station WWBZ in the evening of that same day were identified in the program log with the typed designation "S/A" originally, but the handprinted letters "nc" appeared in front of the "S/A". The changes were not initialled or dated by anyone. The station manager himself made pencilled changes in designations of programs in logs without initialling or dating them.

55. Pursuant to practice sanctioned by Crager, the starting and ending times of certain programs were not entered on logs except that, occasionally, one announcer would enter the ending time. Mr. Crager regarded the starting times of following programs as indicating the ending times of the preceding programs, even though the logs did not reflect this view. The logs of Station WBBZ uniformly fail to contain any entries describing each program broadcast such as "music," "drama," "speech," etc. Pages attached to the official logs in order to record entries during times that broadcasts were being made from the transmitter, contained erroneous information as to classification of announcements.

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Double Billing

56. On March 9, 1962, the Commission released a Public Notice (FCC 62-272) in which broadcast licensees were warned against engaging in the practice of "double billing."^{18/} Terming the act of engaging in this practice "reprehensible in itself," the Commission called to the attention of licensees that it "regards the practice as contrary to the public interest***". Neither Mr. Crager, the WWBZ general manager nor the members of the Board of Directors of Community were aware that the station was engaged in double billing until after the release of the Commission's Public Notice condemning the practice. When a copy of this Notice was received at the station in March, 1962, Crager looked into the matter by taking it up with the station's commercial manager and learned that WWBZ had been, and was engaged in double billing with respect to four accounts. The practice of double billing at Station WWBZ had been carried on there at least from the time Mr. Crager joined the station in April, 1961. Crager directed that this practice be discontinued, and advised the Board of Directors at its next meeting of the Commission's Notice and of the existence of the practice at WWBZ. The Board instructed Crager to see to it that the practice of double billing was immediately stopped. It had in fact been halted before the Board received Crager's report on the matter at its meeting. There has been no double billing by Station WWBZ

^{18/} In the Public Notice, this practice was described as follows: "submitting to a local advertiser two bills, one in the amount agreed upon for advertising material broadcast, the other in a larger amount to be submitted by the local advertiser to a manufacturer or national advertiser to support a claim for reimbursement pursuant to a cooperative advertising agreement."

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since Mr. Crager had the practice stopped in March of 1962. He is under instructions from the Board of Directors of Community during his tenure as general manager to review notices sent out by the Commission to broadcast stations and, upon finding anything in them that the Board should know, to report such information to the Board immediately.

The Hendricksons

Partnership Organization

57. As previously pointed out, Mortimer Hendrickson and his wife, Mrs. Vivian Eliza Hendrickson, own and operate daytime AM Station WDVL in Vineland, New Jersey, under the business name of The Delsea Broadcasters.^{19/} They propose to own and operate the FM Station as a partnership enterprise identified by their individual names in combination.

General Background of the Hendricksons

58. Since 1953, the Hendricksons have resided in Blackwood, New Jersey, about 21 1/2 miles north of Vineland in a dwelling that is provided by the Camden County Psychiatric Hospital (of which Mrs. Hendrickson is the superintendent) in partial compensation for her services. Blackwood lies within the service area of Hendricksons' proposed FM operation. As shown below, both Mr. and Mrs. Hendricksons' have resided and been employed in communities located 22 miles or less from Vineland.

59. Mortimer Hendrickson will have a one-half partnership interest in and serve as full-time general manager of the FM station. He was born in Pitman, New Jersey, (about fifteen miles north of Vineland) where he lived for about 30 years until entering upon military service

and where his family still resides. His background is as follows: In 1938 and 1939, he was employed for about six months in the engineering department of Station WCAM, Camden, New Jersey, as control room engineer and also participated in a similar capacity in the broadcast of "remotes" outside the station. From 1939 to 1964, he was an announcer-salesman at Station WSNJ, Bridgeton, New Jersey, about 8 miles from Vineland. From 1941 to 1942, he was employed in research and development work as an engineering aide, by the U. S. Signal Corps at Fort Monmouth, New Jersey, assisting in technical field work setting up equipment. He had one and one-half years of service, from 1942 - 1943, in the U. S. Air Force during World War II. He served in a Signal Service Company, as an enlisted man, assisting in supplying communications equipment to pilots. From 1943 to 1944, he was a

^{19/} See footnote 4, supra.

news editor and news announcer at Station WFIL, Philadelphia, Pennsylvania, assisting in preparing news and personally doing newscasts. From 1944 to 1948, he was news editor and worked in the publicity department of Station KYW and KYW-FM, Philadelphia. From 1948 to 1951, he was salesman at Station WKDD, Camden, and also secretary and minority stockholder (2%) of the licensee of that station. He also assisted in preparing and announced a weekly half-hour program concerning the histories of South Jersey churches. From 1951 to 1952, he was employed by the U. S. Navy Department as an electronics inspector of Navy radar and sonar equipment at the RCA plant in Camden. From 1952 to 1953, he was employed by the U. S. Department of Agriculture (New York City) in the Radio-TV Branch of the Information Department, preparing farm and

and stock reports to send to news wire services for utilization by radio stations. From 1953 to 1954, he was, with his wife, the owner of Station WHAP, Hopewell, Virginia, and also the general manager of that station. His functions included announcing and selling as well as management. In 1954, he, his wife, and Mr. Jones filed an application for a radio station in Pitman, New Jersey, which was later amended to Vineland, New Jersey, and a different frequency, because of engineering problems. During the period 1954 to 1957 that this application was pending and in hearing during pendency of protest proceedings, he was a free lance salesman for Station WMID, Atlantic City, New Jersey. As an owner and general manager of Station WDWL, Vineland, he assisted in the construction of the station which went on the air in August, 1959, and supervised its operations since then. He has also performed salesman and announcing duties for the station. He has spent about 60 hours a week on the affairs of Station WDWL since it went on the air. Mr. Hendrickson's civic and organizational activities have been as follows: Member, Presbyterian Church, Pitman, since 1949; former Secretary of the Presbyterian Men's Club (1952); Member, Raymond Thoir American Legion Post, Camden (1949-1953); Member in the Masons, Pitman Lodge; Member, Excelsory Consistory, Collingswood, New Jersey, a chapter of the Masonic Order which includes Vineland; Member, Radio Free Europe Committee in Camden; Member Fund Raising Committee of YMCA, Vineland, New Jersey, (1961); and Member, Vineland YMCA since April 1, 1964.

60. Mrs. Vivian Eliza Hendrickson. Mrs. Hendrickson was born in Kutztown, Pennsylvania. She is a registered nurse by profession, and was educated at Cooper Nurses Training School in Camden, New Jersey, and the University of Pennsylvania. Since July 1, 1951, she has been Superintendent of the Camden County Psychiatric Hospital, answering directly to the Camden County Board of Freeholders, the governing body of Camden County. In this capacity, she supervises and directs and organ-

izes all the departments in the hospital of 800 beds, which includes the medical, professional staff, the psychiatric staff, the nursing staff, the ward personnel, and the office personnel. She is in charge of the business affairs including purchasing for the institution and also makes up staff schedules. In addition she teaches and personally conducts high school field tours through the hospital on the average of about once a month. Moreover, she speaks before women's clubs, church groups and high school groups at various surrounding communities. Her scheduled hours at the Camden Hospital are from 9:00 a. m. to 4:00 p. m.,

Mondays to Fridays, and her schedule is flexible even during these hours, since she is not required to be at the hospital continuously and is privileged to absent herself as she deems fit. The hospital authorities have at all times had knowledge of her connection with WDVL; the staff can reach her at the station by telephone when she is there. From 1953 to 1954, she was an officer and part owner, with her husband, of Station WHAP, Hopewell, Virginia. She made three-day visits to the station on alternate weekends to assist her husband in the formulation of programs and in administrative matters. Since WDVL went into operation in 1959, she has engaged in administrative, clerical and programming duties, generally being there during the broadcast day on week-ends (both Saturday and Sunday) and occasionally at night during the week. In the first year of the station's operation, her visits to the station were more frequent, averaging about two nights a week in addition to Saturdays and Sundays. In that inaugural period of the station's existence, she set up the filing system for the station records and the account cards. Mrs. Hendrickson also performed administrative duties which she has continued to do after the first year of operation. From the inception of Station WDVL in August, 1959, she has prepared and conducted on the air a half-

hour children's program on Saturday mornings called "Children's Story Window."

61. Mrs. Hendrickson has been associated with the following organizations: American College of Hospital Administrators (Personal Membership, 1953 to date); American and New Jersey Hospital Associations, (Personal Memberships 1954 to date); American Nurses' Association, (Personal Membership since 1936); Royal Society of Health (England), (Personal Membership 1959 to date); Health and Welfare Council of Camden County; Member, American Red Cross, Camden County; White House Conference on the Aged; Member of Community Services (since 1951); Member of Mental Health Association (Since 1950); Member of Advisory Committee for the Mental Health Association (Since 1959); Member of Committee on Rehabilitation and After Care for the Mental Health Needs of Camden County since October, 1963; Member of Presbyterian Church, Pitman, New Jersey; and Former President (about 1958) of Presbyterian Women's Club, Pitman, New Jersey (1958).

Participation of the Hendricksons

62. Mortimer Hendrickson will be the general manager for the AM and FM stations to be supervised by him. Both he and Mrs. Hendrickson discuss the AM programs with Mr. Morey who prepares the program schedule daily. Also Mr. and Mrs. Hendrickson talk over program policy on weekends and Sundays at home. The scheduling of Mr. Hendrickson's active participation in the operation of both stations has been discussed in detail at paragraphs 16 and 17 above, and reference to Hendrickson Exhibit 3 (Personnel Schedule), readily reflects the same information so that further comment on his role in the day-to-day operation of these stations is not required.

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63. Mrs. Hendrickson will be active in various capacities in the day-to-day operations of the proposed FM station to the extent of a minimum of 16 hours weekly. She will continue to prepare and conduct the half-hour children's program on Saturday entitled "Children's Story Window". The scheduling of Mrs. Hendrickson's participation in the proposed station operations which includes administrative, clerical and relief announcing duties is reflected in Hendrickson Exhibit 3 and has been described in detail in paragraphs 16 and 17, supra, so as to require no further comment at this point.

The Reasons Underlying the Hendrickson's FM Application

64. The existing AM operation of Station WDVL is daytime only and directionalized. In seeking to acquire an FM broadcast facility as proposed in their application, the Hendricksons have been motivated by the desire: to expand their coverage and thereby increase their listening audience; to add a nighttime service so as to supplement their AM schedule, which is now restricted to daytime hours; and to gain the technical advantages (static free, more fidelity) of the FM transmission service. Financial considerations growing out of expenses in connection with their AM station dictated to the Hendricksons that they should not apply sooner for an FM station even though they had earlier considered the desirability of submitting an application for an FM facility in Vine-land.

65. The coverage map for the proposed FM station of Hendricksons shows that it will provide interference-free service, daytime and nighttime, to an area within a uniform radius of about forty miles from the transmitter. Station WDVL presently provides interference-free service, daytime only, to varying distances of about ten to twenty miles from the transmitter.

Hendrickson's Proposed FM Programming

66. Hendrickson's proposed FM programming schedule (Hendrickson Exh. 8) was prepared by Mr. Hendrickson after discussion with Mr. Hendrickson. The proposed station's broadcasting hours will be 8:30 a.m. to 11:00 p.m. Sundays, and 7:00 a. m. to 11:00 p. m. Mondays through Saturdays. Programming duplicative of that on the AM station of WDVL will be carried during the hours that it is on the air, namely 8:30 a. m. to 4:45 p. m., Sundays and 8:45 a. m. to 4:45 p. m., Mondays through Saturdays. Thus, 8 hours daily of additional programming will be provided on the proposed FM station Mondays through Saturdays and 6 1/4 hours on Sundays, for a total of 54 1/4 hours.

67. Hendricksons propose to operate the FM station on a schedule of

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110.5 hours weekly. The analysis of the proposed typical week's programming is as follows:

<u>Program Analysis by Type:</u>		<u>Program Analysis by Source:</u>	
Entertainment	73.9%	Recorded Commercial	38.3%
Religious	11.9%	Recorded Sustaining	49.9%
Agricultural	1.1%	Live Commercial	3.5%
Educational*	0.	Live Sustaining	8.1%
News	7.8	TOTAL COMMERCIAL	41.9%
Discussion	.8	TOTAL SUSTAINING	58.1%
Talks	4.5	Proposed Broadcast Hours Per Week	110.5
		Number of Spot Announcements Per Week	840
		Number of Non-Commercial Spot Announcements Per Week	258

*There are several educational programs in the typical week's schedule (infra) which, however, were not classified as such because of a misconception as to the proper classification for them on the part of Mrs. Hendrickson.

68. The programs which will be carried on the FM station only are: Wake Up Country Style (RC from 7:00 - 8:45 a. m., Mondays through Saturdays), consisting of recorded country music, with two five minute News and Weather programs at 7:30 and 8:30 a. m.; Hymn Time, recorded hymns, 8:35 - 8:45 a. m. Sundays; Music Room, daily from 4:45 - 5:30 p. m., 5:35 - 6:00 p. m., 6:35 - 7:30 p. m., 7:35 - 8:30 p. m., a program of recorded semi-classical vocal and instrumental music presently carried on WDWL from 4:05 - 4:45 p. m.; News and Weather (live sustaining except for one morning program which will be live commercial) daily five minute programs at 5:30, 7:30, 8:30, 9:30, and 10:30 p. m., Mondays through Saturdays; Sports, a live program dealing with sports generally five minutes at 6:30 p. m., Mondays through Saturdays; Music to Dream By, daily from 8:35 - 9:30 p. m., 9:35 - 10:00 p. m., a program of quiet, recorded instrumental music; and Hymns of all Churches (recorded), daily from 10:35 - 11:00 p. m.

69. Non-entertainment programs carried on WDWL, which will be duplicated on the proposed FM station, are as follows:

(a) Religious Programs: Songs of Faith, Mon.-Fri., 9:20 - 9:30 a. m., preceded by a five minute program, Good Morning, supplied by the New Jersey Council of Churches; Twentieth Century Reformation Hour, Mon.-Fri., 10:00 - 10:30 a. m.; Whispering Hope, featuring a sermon by a local minister and recorded music; Country Church, 9:00 - 9:30 a. m., Sun., featuring a studio church service by a local minister; Spirituals (recorded), 10:20 - 11:00 a. m., Sun.; Vineland Methodist Church, both

live and recorded, 11:00-12:00 noon, Sun., featuring a church service; Voice of Hope, 12:45 - 1:00 p. m., Sun.; Latin American Pentecostal Church, 4:00-4:30 p. m., Sun., a live Spanish church service.

(b) Agricultural Programs: Programs with agricultural content furnished by educational organizations are set forth below under Educational Programs. Agricultural information is and will be carried in various newscasts and in the program, How New Jersey Grows, 11:15 - 11:30 a. m., Wed., supplied by the Conservation Department of the State of New Jersey.

(c) Educational Programs: Farm News - Univ. of Delaware (recorded sustaining), 12:00-12:10 p. m., Mon. and Fri., and 12:00 - 12:05 p. m., Tues. and Thurs., consisting of agricultural information supplied by the University of Delaware; Let's Look at Agriculture, 11:00 - 11:05 a. m., Tues., and Food Facts, 11:00 - 11:05 a. m., Thurs., recorded programs supplied by Rutgers University; Speaking Acquaintance, 11:15 - 11:30 a. m., Tues. a recorded program prepared and supplied by Rutgers University with professors discussing books, authors and good reading material; and World Affairs (recorded), 2:00 - 2:15 p. m., Sun., conducted by faculty members of Rutgers University discussing world problems.

(d) News Programs: In addition to the unduplicated newscasts and farm newscasts discussed above, there are five daily five-minute newscasts, Mon.-Sat., three five-minute newscasts on Sundays, all live sustaining, and Bulletin Board of the Air, 2:45 - 2:50 p. m., Mon.-Fri., which features announcements of local events and activities, and announcements in behalf of local governmental officials and civic groups.

(e) Discussion Programs: Administrative Report - Rutgers Extension Service, 11:00 - 11:05 a. m., Monday, featuring discussions by Rutgers University faculty members on such topics as educational needs, teachers and state government salaries; Discussion by the Governor,

4:00 - 4:15 p. m., Wed., featuring discussions by the Governor of New Jersey with one of his officials on current issues of the day; Senator Case Reports (RS), 3:00 - 3:05 p. m., Saturday, and 3:30 - 3:35 p. m., Sunday, (Classified as Talk) a taped report in which Senator Case reports to his constituents and at times includes discussions with other persons on the program; Reports from the other New

Jersey Senator, Senator Williams, consisting of written releases, not on tape, are included in week-end newscasts; and Viewpoint, a recorded program produced by an Episcopal Church organization, 11:15 - 11:30 a. m. Thurs., and 9:00 - 9:15 a. m., Saturday.

(f) Talk Programs: Meet the Artist (LS and RS), 10:30 - 11:00 a. m., Tuesday and Thursday, a program featuring the biography and music of a performing artist; Women's Page of the Air (LS and RS), Monday, Wednesday, and Friday, 10:30 - 11:00 a.m., a talk and incidental music program featuring discussions of women's fashions, hair styles, home gardens and the subjects of interest to women. This program is handled by the station's announcer and, on occasion, by Mrs. Hendrickson. Material is obtained from an organization in New York and one of the agents of the Cumberland County Extension Service in Bridgeton, New Jersey. This program occasionally includes messages from Social Security, Internal Revenue, and other organizations; Vistas from Israel (RS), 11:30 a. m. - 12:00 Noon, Fridays; Beauty Hints (RC) 3:00 - 3:05 p. m., Fridays; Yiddish Language Hour (LC and RC), 1:00 - 2:00 p. m., Sunday, a talk and music program. Features news of Israel, Jewish Culture, traditions, festivals, music. Once a month, includes guest appearances (e.g. Mayor of Vineland) discussing topics of interest; The Mosque (RC), 3:00 - 3:30 p. m., Sundays, a syndicated program sponsored by a Mohammedan Negro organization. WDVL has offered free

time for response to anti-integration views expressed on this program; Children's Story Window (LS and RS), 11:30 - 12:30 Noon, Sat., and instructional program for children, prepared and broadcast by Mrs. Hendrickson personally. She composes and reads birthday poems for sick children, announces birth dates, reads stories, gives descriptions of birds, animals, leaves or trees, generally selecting topics appealing to children in the seven to twelve age group in the first six grades of grammar school; Men and Molecules (RS), 4:30 - 4:45 p. m., Sun., a program furnished by the American Chemical Society (This program may also be discussion); Spotlight on Highways (RS), a weekly 4 1/2 minute program supplied by the New Jersey State Highway Department containing information and news of interest to motorists; and Tops in Sports (RS), 4:00 - 4:05 p. m., Mon., featuring talks by sports stars.

(g) Entertainment Programs:^{19(a)/} Musical Varieties, recorded popular music Mon. - Fri., 11:05 - 11:15 a. m.; Sat., 11:00 - 11:25 a. m., Lunch Time Tunes, Mon. - Fri., 12:10 - 12:30 p. m., 12:35 - 1:00 p. m., featuring popular recordings; Luncheon Music, recorded, Sat., 12:00 - 12:30 p. m., 12:35 - 1:00 p. m.; Show Time, music from musical comedies and current shows, Mon. - Fri., 1:00 - 2:00 p. m.; Favorite Artists, popular music, Mon. - Fri., 2:00 - 2:30 p. m.; Instrumentals, recorded instrumental music, Mon. - Fri., 2:35 - 3:00 p. m.; Tops in Pops, "Top 40" tunes for teenagers, Mon. - Sat., 3:00 - 3:30 p. m., 3:35 - 4:00 p. m.; and Music Room, semi-classical music, Mon. - Fri., 4:05 - 4:30 p. m., 4:35 - 4:45 p. m., Sat. 4:05 - 4:45 p. m. On Saturdays, 1:00 - 2:00 p. m., there will be four short consecutive musical programs (Country Music, Judy Lynn Sings; Polka Time; and Big Time Bands).

^{19(a)/} The listed programs in (g) are duplication of AM entertainment fare.

News and Weather Sources

70. Hendricksons propose to use a news service, Audio Pulse Beat, which will furnish news on tapes and audio news by direct telephone line to the station. Since March, 1964, the news tapes from this source have been received and utilized by Station WDVL. Prior to then, this station's news of the day had been derived mainly from newspaper sources such as the Philadelphia daily newspapers, the Pitman Grove Review, and the New Jersey Farm Labor Report emanating from Vineland, and a news service from Millville, New Jersey. Station WDVL will continue to rely on some of these printed and other news sources and not limit itself to the paid news service. In connection with newspapers, it has been, and would be the practice, by Mr. Hendrickson to utilize the headlines and lead paragraphs of various news items in edited form. He proposes to gather local news from sources such as the New Jersey State Police. Once a week an entire "weather" program will be broadcast (Fri., 12:45 - 12:50 p. m.) based on official information from the station at Pomona, New Jersey. Weather reports are available from Ponona by direct phone call there.

Past Programming

71. The statistical data reflecting past programming of Station WDVL is as follows:

<u>1962 Composite Week (1963 renewal)</u>			
<u>Type</u>		<u>Source</u>	
Ent.	69%	R.C.	19.16
Rel.	9.7	R.S.	74.84
Agr.	2	L.C.	1.26
Educ.	3.5	L.S.	<u>4.21</u>
News	7	Total Comm.	20.42
Disc.	2.7	Total Subst.	79.05
Talks	6.5	Broadcast Hours	
		Per Week	56
		No. of SA	178
		No. of NCSA	90

1963 Composite Week

<u>Type</u>		<u>Source</u>	
Ent.	70%	R. C.	13.25%
Rel.	12.4%	R. S.	63.9 %
Agr.	.7%*	L. C.	13.44%
Educ.	.43%	L. S.	9.0 %
News	6.24%	Total Comm.	26.69%
Disc .	2.56%	Total Sust.	72.9 %
Talks	7.00%	B/C Hours	56
		No. of SA	196
		No. of NCSA	87

*See asterisked footnote at page 32, supra.

72. The nature of the programs broadcast in the past by Station WDVL is described above in paragraph 69. In addition, the following programs have been broadcast: Magic Carpet, a five minute tape from the Book of Knowledge, carried in a thirteen week series, consisting of excerpts from the Book of Knowledge; Mental Health, (Talk and Entertainment, RS), a 15 minute program shown on the composite week day, Sunday, Aug. 4, 1963. Special programming has included announcements for funds for the Cancer Drive, United Fund, YMCA, American Red Cross, Tuberculosis Society, talks by Social Security and Internal Revenue representatives, and by the head of the Vineland Department of Health, and Civilian Defense. WDVL has offered time for an educational program to the principal of the Vineland High School, and to the Vineland Bar Association for a forum program on local laws and social problems. When Little League Tournament baseball games are played in the Vineland area, WDVL has broadcast them. In Pigskin Parade, on Saturdays, for two months, WDVL carried the scores of high school football games. Programming has been carried for Monmouth College, New Jersey, and the station has broadcast announcements of school closings, city recreation department activities, and the Highway Department. The station

has also carried announcements for the local YMCA building fund drive. WDVL has offered time to city governmental officials, including an offer to the present Mayor to put on a fifteen minute program weekly, "Know Your City," and offers of time to the former Mayor and the Chief of Police. On a recent occasion, WDVL broadcast live a Fiftieth Anniversary program for the City of Clayton, which is about twelve miles from Vine-land, consisting of interviews with city officials, including councilmen, the anniversary program, and a dance.

Logging Practices

73. Several programs carried by Station WDVL on August 5, 1962, were incorrectly classified in the program log of that date (Hendrickson Ex. 10) as to the type of program. For example, World Affairs was erroneously classified as a "Speech" program whereas it should have been shown as "News". The program Luncheon Music aired at 12:00 o'clock was misclassified as "sustaining" whereas it was in fact "commercial", and the ending time was erroneously shown as 1:00 p. m., even though this program ran only to 12:45 p. m. The log failed to show the source of the program World Affairs. On the same program log Concepts in Jazz was shown as "Sustaining" even though it had commercial content (one spot announcement).

74. Referring to the program log of Station WDVL for August 4, 1963 (Hendrickson Ex. 11), it is found that for the 9:00 a. m. program County Church, which was sponsored and therefore commercial, the name of the sponsor was not indicated on the log. The program Sunday Morning, carried from 9:30 to 11:00 a. m. was logged as entertainment for this entire period notwithstanding the fact that the last half hour was "religious". Also, the program Favorite Artists at 2:16 - 2:30 p. m. was misclassified as "Sustaining" although it was a "Commercial" program.

Again, the program "Tops in Pops" at 3:35:30 was logged as sustaining throughout although it carried two commercial spots in the last quarter hour thereof. On the WDVL program log for September 25, 1962, the program Music Room, 4:17 - 4:30 p. m. was mislogged as "Sustaining" even though it was interrupted for three commercial spots. In the WDVL program log for January 22, 1962, the program "Tops in Pops" from 3:15 to 4:15 p. m. was not logged as to type of program or origin. On the program log for May 12, 1962, the wrong starting time for News and Weather at 3:51 p. m. was entered. A change made in the logging entries for January 23, 1962 was not initialled.

Spot Announcements

75. In the 1960 and 1963 renewal applications of WDVL, the applicant stated that it would "generally" limit commercial spots to 60 seconds in length and not more than 3 minutes of continuity in a 14 1/2 minute program. However, the program log of Station WDVL for August 4, 1963 (Hendrickson Exhibit 11) reflects that there were 14 half-minute spots within the 20-minute period from 1:16 to 1:36:30 p. m. In its 1963 renewal application, WDVL reported that it had carried four spots in 3 program segments of 14 1/2 minutes each and 5 spots in one such segment. But in three of the four segments during which four or more spots were carried, the total duration of the spots did not exceed 3 minutes. In one segment, the total duration was four minutes.

Double Billing

76. The Commission's decision in the protest proceeding on the Delsea

Broadcasters (WDVL) application for a standard broadcast station in Vineland (16 RR 86 (1958)) contains the finding that one account was

was double-billed by Station WHAP at Hopewell, Virginia, when this station was under the ownership of the Hendricksons in 1953 - 1954. However, the Commission also found that "the one account which was double-billed was serviced in this way only by extension of the practice carried on by the Hendricksons' predecessor" and they had instituted no new accounts of this nature, and that they had represented to the Commission that they would not in the future engage in the practice. Their application for the AM station in Vineland, New Jersey, was granted upon the Commission's denial of the protest. There is no evidence in the record of the instant proceeding that Hendricksons have engaged in double-billing since commencing the operation of Station WDVL in August, 1959.

Sources and Preparation of News Broadcasts

77. Mr. Guy Stanley Horton is employed with Station WWBZ in Vineland as a first-class station engineer. He was an employee of Station WDVL in a similar capacity continuously from September, 1959, to January, 1961. He left that station voluntarily for financial reasons, and has since remained on good terms with Mr. Hendrickson. During his tenure at Station WDVL, he was on duty four days each week from 8:45 a. m. to 4:45 p. m. While he was employed at that station, Mr. Horton observed Mr. Hendrickson preparing for newscasts and then delivering them over the air. On occasions, Mr. Hendrickson was observed by Mr. Horton to be "blocking out" in daily newspapers the news stories to be included in broadcasts. This procedure involved taking a pen and making an angle in the shape of an "L" starting from where Mr. Hendrickson wanted to begin when delivering the particular news item and ending it where he wanted to stop when on the air. This process of "blocking out" news items was directed to marking out the "highlights" in the various news items selected by Hendrickson for reading over the air. Mr. Hendrickson was later seen by Mr. Horton using during newscasts the news-

papers on which the items had been blocked out. Hendrickson edited such items while on the air and did not read them verbatim. Mr. Horton also observed that Mr. Henri Morey, who delivered the newscasts when Mr. Hendrickson was not at the station, likewise blocked out items in newspapers and then used those items during the broadcast in the same manner as Mr. Hendrickson.^{20/}

^{20/} The findings of fact in this paragraph are derived from the testimony of Mr. Horton (Tr. 2578-2602).

78. A newscast delivered over Station WDVL by Henri Morey on February 13, 1964 at 9:32 a. m. and a newscast delivered by Mr. Hendrickson on February 17, 1964 at 12:30 p. m. were recorded "off the air" by the Chief Engineer of Station WWBZ (Tr. 2165 - 2190; Tr. 2358 - 2359). Type-written transcriptions prepared from the recorded tapes containing the two newscasts in question were received in evidence respectively on May 21, 1964 (Community Ex. 23) and May 22, 1964 (Community Ex. 25). Portions of selected pages from The Philadelphia Inquirer, daily newspaper of February 13, 1964 and the Atlantic City Press of February 17, 1964, were also received in evidence (Community Exhibits 24 and 26). A comparison of the specific news items contained in the transcriptions of the broadcasts in question with correlative items in the two newspapers (i.e., comparison of Comm. Ex. 23 with 24, and 25 with 26), reveals a substantial identity of phraseology insofar as lead paragraphs in the newspaper items are involved. Granting that the items in the transcriptions are not totally repetitious of their related newspaper items and are shorter than such newspaper items in most instances, the coincidence of language construction in every instance is too pat to be dismissed as being parallel by sheer chance. Thus the Examiner is constrained to find that the items

in the two newscasts (save for announcements about the "Food Fair" stores and the weather) were derived from items from these newspapers or identical items in other locally circulated newspapers. But, in either event, the Examiner must further find that the news items in the two newscasts were not based on handwritten or other notes, for it is utterly incredible that the news items in these broadcasts were prepared in any other manner than by the "blocking-out" process described above, even granting that the original newspaper sources were "edited".

79. Mr. Hendrickson, when questioned about the sources of the items in his news broadcasts and the method of their preparation, testified: that he has relied on the newspapers and other sources (Tr. 1435); and that he edited "most of the material" taken from newspapers (Tr. 1437); and that he and Mr. Morey "rewrite" the news by writing down notes while reading various newspaper items in advance of the news broadcasts (Tr. 1435, 1438).^{21/} He also stated (Tr. 1432): "I do not read directly from the paper."

80. Later in the hearing, Mr. Hendrickson was questioned about the preparation of the news items that were read by Mr. Morey on the 9:32 a. m. newscast of February 13, 1964. He testified that he (Hendrickson) had prepared that newscast and that he had taken the news items for this program from

^{21/} Mr. Hendrickson explained the editing technique employed by him as follows (Tr. 1431): "* * * I read the first paragraph. I get the first paragraph out of the newspaper, write it down on a piece of paper, add a little more words to it. * * *"

newspapers. He explained that he "edited out of the newspaper" (Tr. 2361). Also he asserted that he "usually writes out items" (Tr. 2363),

and that he wrote out the items in advance for Mr. Morey who then used them on the 9:32 a. m. program (Ibid). When asked about his own newscast of February 17, 1964, at 12:30 p. m., he stated that some of the news items were taken by him from the morning Philadelphia newspaper which he had edited (Tr. 2365). Consideration of Mr. Hendrickson's above-detailed testimony in light of the findings made in preceding Paragraphs 77 and 78 compels the Examiner to find that Mr. Hendrickson's testimony with respect to his practice in preparing items from newspapers for newscasts is not worthy of credence insofar as he claims to have followed a practice of jotting down notes in advance of news broadcasts and not reading from newspapers to any extent when delivering the news on the air. It is most improbable that Mr. Hendrickson went through the tedious process of copying a paragraph or two from several news items in a daily newspaper with but few changes in wording, and for him to claim to have done so strains credulity beyond the breaking point.

81. The Hendricksons' plans for programming news for their proposed FM operation contemplates the use of: a news service consisting of taped news and voice wire news; information furnished by various governmental services (Agriculture, labor, etc.); daily newspaper headlines and items; and other customary local news sources.

Conclusions

Financial Qualifications of the Hendricksons

1. In order to establish the financial qualifications of the Hendricksons with respect to their FM application, they must demonstrate the availability of funds sufficient to defray the costs of construction of the proposed facility and of operating it for an initial period of three months without revenue. See, Memoranda Opinions and Orders of the Review Board in College Radio et al., FCC 64R-515, released November 16, 1964, and Cleveland Broadcasting, Inc., 1 RR 2d 676, 678, (released December 3, 1963).

2. As established by the record, the Hendricksons have available to them \$12,181.87 in liquid funds to finance the construction and operation of their FM proposal for 3 months without revenues. The evidence further shows that the financial requirements of such construction and operation will total \$8,744.69^{1/}. If financial requirements are taken into consideration for the

^{1/} The figure of \$8,744.69 takes into account only the incremental costs attributable to the FM operation over and above the present costs of the AM station operation.

combined AM-FM station operations of Hendrickson for three months without regard to revenue from either operations the Hendricksons would require the sum of \$12,108.69. Measured against the availability of \$12,181.87, their financial ability to construct the FM station and operate that facility or even the combined AM-FM facilities, for three months without any revenues has been established beyond question. In point of fact, the Hendricksons' AM station is operating at a profit so that the application of the more rigorous standard of financial ability (i.e., assuming no AM revenues for three months) is not required in the instant case. See, College Radio, supra., at page 2 (Par. 3) thereof. Assuming, as has been argued, that the proper criterion to be employed for the determination of Hendricksons' financial ability is the availability of funds to construct their proposed FM station and to operate both the AM and FM stations for an entire year, with no revenues being realized during the entire first year of FM operation, it must still be concluded that they are financially qualified. For it has been found that the Hendricksons would have available the sum of \$37,301.15 to cover cash requirements of \$36,124.68 under the last-mentioned assumption. It is thus concluded that no matter which of the above-mentioned three tests is invoked by

Community, or the other parties, Hendricksons must be held financially qualified in each case. In this connection, there is no warrant in Commission precedent for Community's contention that the personal income of an applicant from an outside source other than its broadcasting operations must be excluded in determining the question of the applicant's financial ability to construct and operate its proposed station.

Adequacy of the Hendricksons' Proposed Staff

3. The staffing proposal of the Hendricksons shows that eight persons will be employed in technical and programming aspects of the combined AM-FM facilities. The detailed personnel schedule submitted by Hendricksons (Hendrickson Exhibit 3) listing the specific persons who will be on duty at WDVL during three operational shifts and also the total hours per week that each of them will devote to various station activities, the experience of most of these persons, the provision made by Hendricksons for the most efficient manner of execution of the required operational duties, the compact and composite arrangement of the studio and the AM and FM transmission equipment, the considerable number of programs, particularly on weekends, requiring relatively little participation by staff announcers or engineering personnel—all these factors considered together lead to the conclusion that the eight persons listed in the work schedule, together with a ninth individual available on a standby basis, will be adequate to program the combined operations (AM and FM) of Hendricksons and to operate the technical equipment of both facilities in accordance with the Rules of the Commission.

4. A question has been raised, however, by Community with respect to the adequacy of the proposed staff to take care of maintenance. It was the opinion of Community's consulting engineer at the hearing that a minimum of eight hours weekly was required for maintenance of the combined operations (i.e., directional operation of the Hendrickson AM station and

and non-directional FM operation.). He advocated that about six hours of the maintenance schedule should be performed in the "experimental" period (between midnight and 8:00 a. m.), and it was his opinion

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that about two-thirds of the eight hours of maintenance should be devoted to studio equipment.

5. It is here to be noted the Commission's Rules do not require that any specific number of hours per week be devoted to maintenance or that maintenance must be done at any specific time. To assure adequate maintenance, Hendricksons propose to rely on the services of their present engineering personnel and to contract out for additional maintenance work required by reason of the FM operation. To this end, they will engage the services of a first-class engineer who will spend about two hours a week in a period between 11:00 p. m. and 2:00 a. m. on his duties. Unquestionably, Hendricksons will have the funds to meet the additional expense of \$30.00 a month entailed by the employment of the contractual maintenance engineer. The maintenance contemplated by the Hendricksons for the proposed combined operations was discussed with, and deemed to be adequate by, their first-class engineers and their first-class standby engineer who presently do the maintenance work at WDVL. There is no evidence that the two specific maintenance steps required by the Rules could not adequately be handled by the personnel proposed. It is significant that the past maintenance performed by WDVL has at no time been questioned by FCC inspectors. Its adequacy is further indicated by the fact that the station has been required to go off the air on only three occasions for a total of about 1 1/2 hours during the past two years and on no occasion was the silence a result of proper maintenance. In view of the foregoing considerations, it is concluded that Hendricksons have provided for adequate personnel to fulfill the

maintenance requirements of their AM and FM operations. Accordingly, it is further concluded that the staff proposed by the applicant will be adequate to operate their proposed FM station in conjunction with Station WDVJ.

Comparative Issue Factors

Local Residence

6. The majority stockholder in Community, Lewis D. DeMarco, owner of 51.5% of the voting stock, and four other stockholders all reside in Vineland. These five stockholders collectively own approximately 70% of the voting stock of Community. Joseph M. Bullock, the president and owner of 20% of the voting stock of this applicant, resides in Milmay, New Jersey, which is only nine miles from Vineland. Roy Yates, owner of a 2% interest in Community, resides in Port Norris, approximately 16 miles to the south of Vineland.^{2/} Mr. and Mrs. Hendrickson, who as partners will own their proposed FM station, reside in Blackwood, New Jersey, which is about 21 1/2 miles north of Vineland but well within the service area of their proposed FM operation. Since the majority stockholder and four other stockholders, representing collectively about 70% of the voting

^{2/} The estates of Peter Levari and John J. Daneri hold 5% and 2.5%, respectively, of the voting stock, and no information as to the residence of those having the right to vote and stock has been adduced.

stock ownership in Community, reside in Vineland where the proposed station will be located, and the owner of another 20% of this applicant's voting stock resides only nine miles from Vineland, it is concluded that Community merits a distinct preference in the comparative factor of local residence over the Hendricksons, who reside over 20 miles outside of the city of station location. It should be added that at least four Community

stockholders (who together own about 60% of its voting stock) have all been residents of Vineland for many years. The fact that Mr. Hendrickson resided for 30 years in Pitman, about 15 miles north of Vineland, is of very minor significance.

Participation in Local Civic and Organizational Activities

7. Four of the principals in Community, each of whom is on its Board of Directors and representing collectively 61% of the voting stock ownership of this applicant, have long been active in civic, organizational and church affairs in Vineland. Mr. DeMarco, the majority stockholder, and Mr. Lihn, a 5% stockholder and the secretary of Community, have noteworthy records of participation in this regard. Mr. Zucca, the treasurer and a director of Community, has recently been publicly honored for his many years of distinguished service to the Vineland community in promoting a variety of worthy causes. While Mr. Hendrickson has held membership and has been active to some extent in organizations of communities within the proposed FM service area of Hendricksons, he has been personally identified with the activities of but a single organization in Vineland. Mrs. Hendrickson's organizational memberships and activities have been heavily oriented in the direction of her professional interests. These activities have been carried on by her in locations within the proposed service area of the Hendricksons' proposed FM station. She has a past record of active participation in a Pitman church. However, her biographical data has shown no particular affiliation on her part with local Vineland civic groups or other Vineland organizations. A comparison of the activities of the principals of the two applicants in the area of local civic and organizational participation inevitably results in a clear preference for Community.

Diversification of Business and Professional Interests

8. In addition to their ownership interests in Station WWBZ in

Vineland, various stockholders of Community are engaged in a number of different business enterprises and commercial activities in Vineland. Mr. DeMarco, the majority stockholder, has been sole owner of a real estate firm in Vineland since 1943 and serves as a director of the Vineland National Bank and of the Vineland Savings and Loan Association. Mr. Lihn is the sole owner of Tri-State Transportation Company of Vineland, a sizeable trucking corporation employing about 80 residents of the Vineland area. Mr. Zucca, treasurer and a director of Community, owned and operated a bakery in Vineland for about 40 years, and this enterprise is now operated by his sons. Joseph M. Bullock, the president, was a partner in an automobile sales agency in Vineland until 1960. He still owns and rents out commercial properties in Vineland. Lemuel B. Newcomb, a director and 2% stockholder, has been engaged in the oyster business in the Vineland area,

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which formerly employed some 300 persons. Although not presently active in business, he intends to participate again in the oyster business when certain adverse blight conditions are overcome. The professional and business activities of the Hendricksons in the Vineland area have been less varied. Their involvement in the commercial life of the city of Vineland has been limited to the operation of Station WDWL since 1959. Previously Mr. Hendrickson was involved in broadcasting and in employment in the field of electronics at places within the proposed FM service area of the Hendricksons. Mrs. Hendrickson has also been employed as the superintendent of a large psychiatric hospital in Camden County located within the proposed FM station area but outside of Vineland. By comparison, then the principals of Community are shown to have a greater diversification of local business and professional interests than the Hendricksons and thus merit a definite preference in this factor.

Integration of Ownership and Management

9. Community has made no proposal or commitment that any of its stockholders will devote any time to the day-to-day management or participate either full time or part time in the operation of the proposed FM station. In fact, the responsibility for supervising the day-to-day operation of the station will devolve upon Robert C. Crager, who is presently serving as the general manager of Station WWBZ. The record shows that Crager discusses station affairs with DeMarco, the majority stockholder, on an average of three times a week at the latter's office and also talks to him on the telephone during the week. Also, Mr. Lihn, the secretary and a director of Community, meets Crager at the Vineland post office about three times a week, and they talk about developments at the station and any programming suggestions that Lihn has. Both Lihn and Bullock, the station's president, sign station checks brought to them from time to time by Crager. Through meetings of the board of directors of Community, held twice monthly, the principals of Community keep currently informed on problems and operations of Station WWBZ as a result of the attendance of Crager at these sessions which are held in the station.

10. The Hendricksons, on the other hand, have committed themselves specifically to participate actively in the day-to-day management and operation of their proposed FM station. Mr. Hendrickson, who will be the general manager, will devote all of his time, a minimum of about 50 hours weekly, to management, announcing, engineering and sales duties. Mrs. Hendrickson will devote a minimum of 16 hours weekly to announcing, the handling of specific programs (Children's Story Window), and clerical duties. The Hendricksons have performed similar duties while participating in the day-to-day management and operation of Station WDVL. Accordingly, a substantial preference on the integration factor must be awarded to the Hendricksons.

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Broadcast Experience

11. The broadcast experience of the stockholders of Community derives from their ownership interests in Station WWBZ, in Vineland, which was established in 1947. Their participation in the operation of the station has been principally by way of service on the Board of Directors of Community and in various corporate officer capacities. So far as appears from the evidence, the day-to-day operations of Station WWBZ have been guided by the manager employed by Community. From about 1957, when the Commission granted a renewal of Community's license for Station WWBZ, following hearings, the principals of Community have seriously concerned themselves with the formulation and execution of the station's policies, and in the past several years, Mr. DeMarco, the majority stockholder and vice-president, and Lihn, the secretary of Community, have closely observed the conduct of the station and have consulted with the manager frequently on the station's problems. None of the Community stockholders have been employed in the day-to-day operations of the station.

12. The Hendricksons, on the other hand, have had personal experience in all aspects of broadcast operations at two stations owned by them. Station WDVJ in Vineland, since 1959, and Station WHAP, Hopewell, Virginia, in 1953-54. Since 1938, Mr. Hendrickson, at these and a number of other stations, has had experience in management, announcing, sales, program preparation, newscasting and engineering. Mrs. Hendrickson, as the partner with Mr. Hendrickson in both Stations WHAP and WDVJ, has had experience in administration, preparation of and participation in on-the-air programming, announcing, bookkeeping and clerical work. A clear preference must, accordingly be awarded to the Hendricksons on the factor of past broadcast experience.

Past Programming

13. Community has been operating its AM station in Vineland on a daily schedule from about 6:00 a. m. to midnight except on Sundays when it goes on the air about 8:00 a. m. The Hendricksons have adhered to a schedule for their AM operation in Vineland which runs for eight hours daily, generally from 8:45 a. m. to 4:45 p. m. The program statistics submitted on behalf of both applicants show that each has carried a balanced program schedule which takes account generally of the program needs of the Vineland area listeners. Scrutiny of the specific programs carried by both stations reflects that each has supplied a varied program fare that offers to the listeners programs in all of the categories which the Commission deems representative of the program needs in most areas (i. e., entertainment, religious, agricultural, educational news, discussion and talks). However, Community has demonstrated a record of outstanding accomplishments in its attention to and satisfaction of the local needs of the Vineland area for "public service" programs. Thus, for example, it has regularly carried as "live" programming the meetings of the Vineland City Council and a weekday "Sound-Off" program, one hour in length, consisting of discussions on practically any subject a listener desires to comment on or to have authoritative opinions expressed on

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by knowledgeable persons. Community produced at the hearing a most impressive aggregation of leading public officials and other prominent persons connected with civic, religious, charitable, and organizational activities in the Vineland area. Their comments at the hearing as to the cooperation given them by Community in publicizing and promoting their work through many programs constitute a striking testimonial to the extensive "public service" programming rendered by Community. Indeed,

no facet of civic, charitable, or other public interest undertakings in the Vineland area has been overlooked by Community in making its facilities available to the entire Vineland area. While the Hendricksons have been mindful of the public service needs of this area, its efforts in this area have not been as assiduous as those of Community or produced such a notable record of accomplishment. It is therefore concluded that Community merits a distinct preference in the factor of past programming.

Logging

14. The record demonstrates defective logging practices on the part of both Station WWBZ and Station WDWL. These practices justify a demerit to each applicant, but no meaningful distinction as to the extent of such demerit can be drawn between the applicants.

Spot Announcements

15. In its AM station renewal applications for 1960 and 1963, Community represented that its practice with respect to commercial spot announcements would be "generally" to broadcast not more than four such "spots" in each 14-1/2 minute program segment. It has been found that Community did exceed this self-imposed limitation in a considerable number of instances. But, in about twice as many 14-1/2 minute segments, there were no spot announcements carried. Thus, it is concluded that Community has met its commitment with respect to the maximum number of spots in a 14-1/2 minute segment in that generally it adhered to the declared policy. Instances of "double" and "triple" spots were not so numerous as to warrant a demerit against Community on account of them. In this connection it is noted that the Hendricksons have occasionally exceeded their own declared policy on the maximum number of spots to be carried by them within a stated period. But, no demerit is to be assessed against them either for their infrequent departures from their avowed intention as to adhering to a limitation in their "spots".

Programming

16. Each of the applicants offers an essentially well-balanced programming proposal based on its experience as a broadcaster in the community.^{3/} Although differences between the two proposals are perceivable, they are not of the sort which merit a comparative preference for either applicant.

^{3/} Indeed, much of the programming of both applicants would duplicate their existing AM programming. While the Hendricksons would offer more non-duplicated programming, this is primarily because their FM station would operate during hours in which their AM station is silent. However, the character of the Hendricksons non-duplicated programming does not so differ from that which would be offered in conjunction with their AM operation as to form the basis for a programming preference.

Double Billing

17. Both applicants have been shown to have engaged in "double billing" in the past: the Hendricksons with one account in connection with their ownership of Station WHAP in 1953-54, and Community with 4 accounts of Station WWBZ in and prior to 1962. While the circumstances surrounding these violations do not indicate that the severest sort of censure should be directed to either party, it is a factor to be weighed against each. However, in view of the chronological remoteness of the Hendricksons' offense, and the fact that the practice was relatively more widespread and longer continued in the Community operation, the opprobrium falls with slightly more force on Community than on the Hendricksons.^{4/}

Proceedings on WWBZ Renewal Application

18. Proceedings instituted by the Commission in 1952 on the renewal application of Community for Station WWBZ resulted in the findings:

that the station had broadcast horse-racing information that was used by persons engaged in illegal gambling activities; that the directors of this station had neglected their responsibilities with respect to programming for the true needs of the Vineland area; and that the licensee of Station WWBZ had failed to carry out its licensee responsibilities. Ultimately, the station's license was renewed following a further hearing which revealed there had been a drastic change in station policies and programming. There has been no recurrence of the broadcasting of the specific racing programs which were found to offend the public interest and it is clear from the record in the instant hearing that the directors of Community have been zealous in conducting the station's operations in a manner truly responsive to local programming needs. They have also manifested a sincere desire to operate their station in strict compliance with Commission Rules and policies. It is concluded that the remoteness in time of the conduct which the Commission had found reprehensible in the renewal proceedings and the exemplary manner generally of the operation of the station WWBZ in the public interest constitute persuasive reasons for not assessing a demerit against Community on account of the earlier misdeeds mentioned above.

News Programming of Station WDWL

19. It has been found that until early in 1964 the Hendricksons used, among other sources for their news programs, daily newspapers published in Philadelphia and in communities in the Vineland area. This practice was readily admitted by Mr. Hendrickson, who also asserted that he did not carry items from newspapers verbatim in his newscasts but, instead, "edited" and utilized headlines and lead paragraphs from various newspaper stories. He denied, however, that he "blocked out" portions of newspaper items and then read from those items while delivering the news on the

^{4/} While the existence of "double billing" was unknown to the Community directors, and discontinued when it was directed to their attention, Community cannot therefore escape the consequences of the act, KWK Radio, Inc., 25 RR 577.

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air. On the basis of convincing, countervailing evidence in the record, it has been found that this denial of Mr. Hendrickson could not be believed. Notwithstanding such resolution of the particular question against Mr. Hendrickson's contention, it is concluded that no demerit against the Hendricksons should result, for, among hundreds of pages of testimony by the Hendricksons, this matter represents a single, isolated incident where Mr. Hendrickson's testimony has been questioned as to accuracy, and its effect is greatly diminished by the candor displayed by this same witness in testifying generally on the use of newspapers as newscast sources. As has been noted above, Mr. Hendrickson displayed no reluctance in admitting that he used newspapers for his news. For these reasons, it is concluded that the above-noted adverse finding regarding the manner of the use of the newspapers by Mr. Hendrickson while delivering newscasts would not adversely affect the qualifications of the Hendricksons to be the licensee of their proposed FM station, and is not to be viewed as requiring any demerit against them.

Summation

20. The issues concerning (a) the financial qualifications of the Hendricksons to construct and operate their FM station as proposed, and (b) the adequacy of the staff proposed by them to operate their proposed FM station in conjunction with Station WDVL, have both been resolved in favor of this applicant. Therefore, it must be held that the Hendricksons

possess the requisite basic qualifications for a grant of their FM proposal.

21. Turning to a consideration of the conclusions reached above as to the relative merits of the applicants and their respective proposals under the standard comparative issue, it has been determined that Community is entitled to a distinct preference over the Hendricksons in the factor of local residence, a clear preference in the factor of local civic and organizational participation, and a definite preference in the factor of diversification of local business and professional interests. These three factors are viewed by the Commission as collectively bearing on the awareness and responsiveness of a station's ownership to local programming needs.

22. The Hendricksons have been found deserving of a substantial preference with respect to the comparative criterion of integration of ownership with management. This factor relates to the likelihood of the effectuation of an applicant's proposal. Also, the Hendricksons have been found deserving of a clear preference in the area of past broadcast experience. However, in the comparative area of past programming, Community as the licensee of an AM broadcast station in Vineland has been awarded a distinct preference over the Hendricksons who have been the licensee since 1959 of Station WDVL (AM) in Vineland. Community has been found deserving of their preference in this respect by reason of its superior "public service" programming as discussed above. The factor of "past programming" is an important touchstone in gauging the quality of performance of an applicant with respect to the future operation of its proposed station. No preference for either applicant has resulted from an appraisal of their programming proposals. While various differences between their respective programming schedules are discernible, the total impact of such proposal is to provide assurance to the Commission that either of the applicants have formulated

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a well-balanced programming fare which should satisfy the various basic programming needs of the Vineland area.

23. Both applicants have been found to have engaged in the reprehensible practice of "double billing", and their infractions of Commission policy in this regard have evoked the assessment of a demerit against each, with Community however being more blameworthy in this area and thus being penalized somewhat more heavily than Hendricksons because this practice was relatively widespread and prolonged on the part of Community.

24. Careful consideration of "logging" derelictions by both applicants in connection with the operation of their AM stations has resulted in equal demerit on this score against both. A consideration of the "spot announcement" practices of both applicants in light of their stated policies to the Commission has been found not to require a demerit against either applicant. So, too, appraisal of the programming policies and practices of Station WWBZ and the manner of the discharge of their responsibilities by Community's Board of Directors has been found not to warrant a demerit for reasons explained above.

25. Thus, although not all of the advantages accrue in favor of either applicant, upon a balancing of the aforesaid preferences and demerits, it is concluded that a grant of the Community application would better serve the public interest. While the considerations of past broadcast experience and integration operating in favor of the Hendricksons are not inconsequential, they do not outweigh the factors favoring Community. The substantially greater local identification, coupled with the superior record of past broadcast performance of Community lends greater assurance of a continuing operation responsive to the needs of the Vineland area. The enumerated demerits are not of sufficient significance

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to require a modification of the aforesaid result in favor of Community's application.

Accordingly, IT IS ORDERED, this 15th day of December, 1964, that unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Community Broadcasting Service, Inc., for a new FM station (Class A) to operate on Channel No. 221 in Vineland, New Jersey, IS GRANTED, and the application of Mortimer Hendrickson and Vivian Eliza Hendrickson for the same broadcast facility IS DENIED.

/s/ Isadore A. Honig and Chester F. Naumowicz, Jr.
Hearing Examiners
Federal Communications Commission

Released: December 16, 1964
and effective 50 days thereafter,
subject to the provisions of the
Rule cited in the ordering clause
above. Exceptions, if any, must
be filed within 30 days of the re-
lease date unless an extension is
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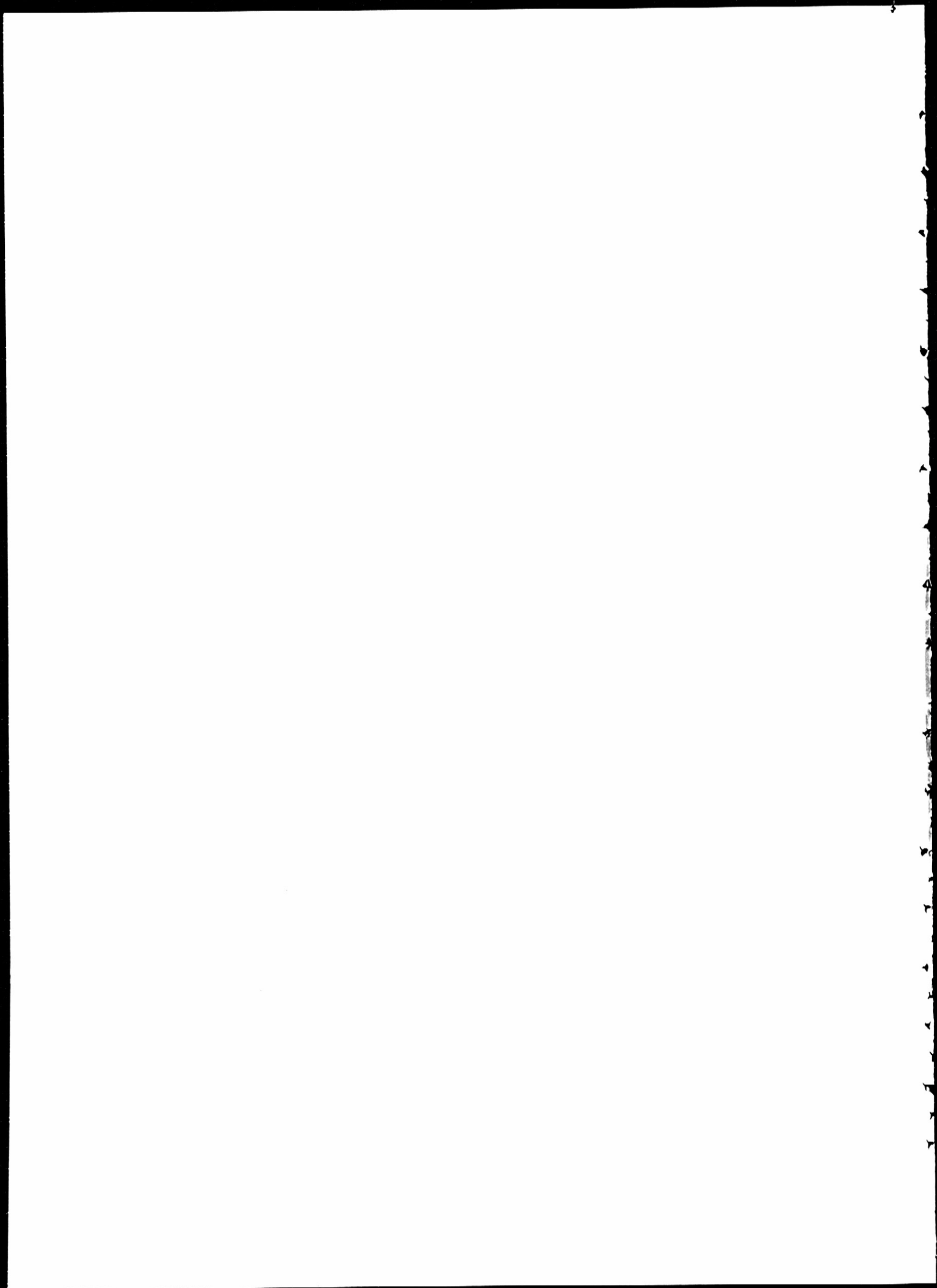
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Accordingly, IT IS ORDERED, this 15th day of December, 1964, that unless an appeal from this Initial Decision is taken by a party or the Commission reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, the application of Community Broadcasting Service, Inc., for a new FM station (Class A) to operate on Channel No. 221 in Vineland, New Jersey, IS GRANTED, and the application of Mortimer Hendrickson and Vivian Eliza Hendrickson for the same broadcast facility IS DENIED.

/s/ Isadore A. Honig and Chester F. Naumowicz, Jr.
Hearing Examiners
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DECISION77839
FCC 65R-447

By the Review Board: Berkemeyer and Pincock. Board Member Nelson concurring only in the result and issuing a statement.

I. Preliminary Statement

1. Each of the above applicants seeks a construction permit for a new FM broadcast station at Vineland, New Jersey, the station to operate on an unlimited time basis on Class A frequency 92.1 Mc/s (Channel 221A). Designated for hearing by Order released January 21, 1964 (Mimeo No. 46004), the case was heard by Hearing Examiner Isadore A. Honig on three evidentiary issues: financial and staffing issues as to the Hendricksons,^{1/} and the standard comparative issue. Hearing Examiner Chester F. Naumowicz was associated with Examiner Honig in the preparation and issuance of the Initial Decision, the applicants and the Commission's Broadcast Bureau having consented to the arrangement. (Order of Chief Hearing Examiner released November 19, 1964, FCC 64M-1160).

2. The Initial Decision of Examiners Honig and Naumowicz was released on December 16, 1964 (FCC 64D-89). The financial and staffing

^{1/} The financial and staffing issues were added by the Review Board by Memorandum Opinions and Orders released, respectively, on March 31, 1964 (FCC 64R-175) and April 17, 1964 (FCC 64R-218).

issues were resolved favorably to the Hendricksons. The findings of fact and conclusions of law with respect to the foregoing issues have not been excepted to, and they are hereby adopted.

3. The Examiners preferred Community under the standard comparative issue, and, accordingly, recommended a grant for Community

and a denial as to the Hendricksons. In the Examiners' view, preferences awarded the Hendricksons under the criteria of integration of ownership and management and broadcast experience were insufficient to overcome preferences to Community under the criteria of local residence, civic participation, diversification of business interests, and past programming. A comparative demerit to Community for being "more blameworthy" with respect to "the reprehensible practice of 'double billing'" ^{2/} (engaged in, in the past, by both applicants), was held by the Examiners to be "[in]sufficient to require a modification of the aforesaid result in favor of Community's application."

4. The proceeding is now before the Review Board for decision on exceptions to the Initial Decision filed by the Hendricksons. Oral argument, in which both of the applicants and the Commission's Broadcast Bureau participated, was held before a panel of the Review Board on September 16, 1965. In brief, it is the Board's position that the Examiners' recommendation should be reversed, and that the construction permit here in contest should be awarded to the Hendricksons. Our reasons are set forth below.

5. At the outset it must be noted that this case must be decided in accordance with policies enunciated by the Commission in its Policy Statement on Comparative Broadcast Hearings (Public Notice), FCC 65-689, 1 F.C.C. 2d 393, 5 R.R. 2d 1901 (released July 28, 1965). In the foregoing connection, in the last paragraph of the Policy Statement, the Commission indicated that the only cases to be excepted from the new policies are those "which have already been decided, either by the Commission or, where appropriate, by the Review Board." It should also be observed that the Commission, in the same paragraph of the Policy Statement, made clear that it was "not adopting new criteria which would call for the introduction of new evidence, but rather restricting the scope somewhat of existing factors and explaining their importance more clearly." Finally, here, it is emphasized that the award to the Hendricksons need not rest on the pronouncements of the Policy Statement; and that, properly interpreted and applied, the policies in effect at the time of the Initial Decision

would dictate the same result. This point will not be dwelled upon in depth because of the mootness of the

^{2/} "Double Billing" has been defined by the Commission as "submitting to a local advertiser two bills, one in the amount agreed upon for advertising material broadcast, the other in a larger amount to be submitted by the local advertiser to a manufacturer or national advertiser to support a claim for reimbursement pursuant to a cooperative advertising agreement." Double Billing Practices (Public Notice), FCC 62-272, 23 R.R. 175 (released March 9, 1962).

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question presented. In brief, however, it may be noted that the principal errors of the Examiners were the following: (a) in rating the applicants under the local residence factor,^{3/} the Initial Decision gave no consideration to the fact that the Hendricksons have operated a standard broadcast station in Vineland since 1959, Mr. Hendrickson commuting to Vineland and devoting full time to the day-to-day operation of the station;^{4/} (b) in rating the applicants under the past broadcast record criterion, the Initial Decision awarded Community a preference greater than is warranted by the total facts of record;^{5/} and (c) the Initial Decision ignores the significant differences between the applicants under the criterion of diversification of control of the media of mass communication.^{6/}

6. The Commission's Policy Statement (1 F.C.C. 2d 394, 5 R.R. 2d 1908) declares "that there are two primary objectives toward which the process of comparison should be directed. They are, first, the best

^{3/} Local residence, civic participation, and diversity of business interests have been held by the Commission to be elements of the overall criterion of area familiarity. See Veterans Broadcasting Co., Inc., 38 F.C.C. 25, 26, 4 R.R. 2d 375, 383 (1965). Local residence has been said to be "of primary concern here, for it carries with it a presumption of knowledgeability, which may be strengthened or weakened in proportion to the extent to which the applicant's principals have participated in the civic and business affairs of the area to be served." Jefferson Standard Broadcasting Co., 33 F.C.C. 471, 481, 24 R.R. 319, 333 (1962); affirmed sub nom. High Point Television Co. v. F. C. C., 118 U.S. App. D.C. 192, [continued on next page]

^{3/} [continued from preceding page]
 334 F.2d 582, 2 R.R. 2d 2052 (1964). The trend of the Commission in the cases immediately preceding the Policy Statement was to award one preference for the overall criterion, and not -- as the Examiners here have done -- to award separate preferences for each of the constituent factors. See e.g., the Veterans case, *supra*; Grand Broadcasting Co., 36 F.C.C. 925, 929, 2 R.R. 2d 327, 338 (1964); Young People's Church of the Air, Inc., 36 F.C.C. 1127, 1129, 2 R.R. 2d 527, 533 (1964).

^{4/} The station is licensed to The Delsea Broadcasters, a partnership comprised of the Hendricksons and John Thomas Jones, Jr. Jones does not participate in the operation of the station, and the Hendricksons have contracted to purchase his one-third interest in the entity.

^{5/} See paras. 25, 30-38 and 40-48, *infra*.

^{6/} For cases wherein preferences with respect to past broadcast record were held by the Commission to be more than offset out of diversification considerations, see Veterans, *supra*, 38 F.C.C. 55, 4 R.R. 2d 411, and Grand, *supra*, 36 F.C.C. 938, 2 R.R. 2d 346.

practicable service to the public, and, second, a maximum diffusion of control of the media of mass communications." The facts in this proceeding, viewed in the light of the guidelines and other clarifying material set forth in the Policy Statement, persuades the Board that with respect to each of the goals designated as primary by the Commission, the Hendricksons have a clear and definite edge, and that the overall public interest would be better served by a grant of their application than by a grant to Community. The diversification aspects of the case are the less complex, and they will be disposed of first.

II. Diversification of Control of Media of Mass Communication

7. Each of the applicants is presently the licensee of a Class III standard broadcast station in Vineland, the city applied for, and the absence of conclusions in the Initial Decision as to the diversification factor makes it obvious that the Examiners probed only to the foregoing fact in holding, in effect, that the applicants are equal in this area of

comparison. Although it may be reasoned that, in terms of their present situations, the differences between the applicants are moderate, there are substantial differences between them when the comparative effects of a grant to either applicant are considered. The latter phase of the diversification question was completely ignored by the Examiners, and it is in this respect that the Initial Decision is most significantly in error.

8. Vineland, New Jersey is the most populous community in Cumberland County, and is located in southern New Jersey, approximately 30 miles west of Atlantic City, and the same distance south of Philadelphia. Its 1960 population was 38,690, and it has the largest area (68 square miles) of any city in New Jersey. Vineland's economy is based on agriculture and industry, and many egg and poultry producers, truck farmers, and manufacturers and processors are located in the area. Three media of mass communications are located in Vineland: the two radio stations licensed to the applicants herein, and The Vineland Times-Journal, a daily newspaper.^{7/} Community's present outlet (WWBZ) is an unlimited time station, operating on the frequency 1360 kc/s, with 1000 watts of power, and a directional antenna at night. Daytime, it serves to distances of 15-to-20 miles from its transmitter; at night it serves to distances of approximately 5 miles from the transmitter. Hendricksons' station (WDVL)^{8/} is a daytime only station, operating on the frequency 1270 kc/s with 500 watts of power, and a directional antenna. It serves to distances of 10-to-20 miles from its transmitter. Both WWBZ and WDWL are Class III regional stations, designed to render service primarily to a principal

^{7/} No principal of either of the applicants has an ownership interest in the newspaper.

^{8/} See Note 4, supra.

center of population and the rural area contiguous thereto.^{9/} Each of the proposed FM stations would provide service (50 uv/m), daytime and nighttime, to the area within a uniform radius of approximately 40 miles from the transmitter. The frequency applied for (92.1 Mc/s -- Channel 221A) is a Class A channel designed to render service to a relatively small community, city, or town, and the surrounding rural area; it is the only FM channel allocated to Vineland.^{10/}

9. WWBZ was originally authorized in 1946, and all of its five officers and directors (owning a total of 81% of the stock) have been officers and/or directors of the licensee corporation from the beginning or shortly thereafter. The principal change in the original corporation is that, over the years, Lewis D. DeMarco (vice president and director) has increased his ownership from 1% to 51.5%, acquiring majority control in February, 1963; he has been the largest stockholder in the corporation since approximately 1948.

10. A monopoly situation prevailed in Vineland until February, 1957, when the Commission authorized WDWL. WWBZ protested the grant, alleging economic injury, and setting forth a total of twelve character and/or public interest charges against the Hendricksons. An evidentiary hearing was held, and by Decision released August 4, 1958, the Commission affirmed the original grant. The Delsea Broadcasters, 25 F.C.C. 449, 16 R.R. 86 (1958). In that "some errors in judgment and in operating practices at Station WHAP undoubtedly were committed by the Hendricksons", the protest was held to be "not entirely of a frivolous or sham nature." The Commission went on to observe, however, (id. at 25 F.C.C. 468-69, 16 R.R. 100), that

"This is not to say that the Commission does not regard the very insubstantial nature of the proof offered by protestant in certain areas as a matter of concern. The burden of pending hearing cases is such that the Commission regrets that hearing time must occasionally be

consumed in the attempted proof of protest issues as to which no appreciable amount of proof is found to exist." ^{11/}

^{9/} See Section 73.21(b)(1) of the Commission's Rules.

^{10/} See Sections 73.202 and 73.206(a) of the Commission's Rules.

^{11/} Cf. Judge Washington's concurring opinion in Interstate Broadcasting Co., Inc. v. F. C. C., 116 U.S. App. D.C. 327, 323 F.2d 797, 25 R.R. 2046 (1963), where it is observed that "an established and powerful station can delay a grant of new applications for apparently available frequencies by setting up a barrage of allegations," thereby effectively thwarting "the Commission's intention that new service to the public should be favored."

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11. As indicated above, the FM channel sought by the applicants is the only one presently allocated to Vineland. It is clear that a grant of the Community application would give Community a nighttime radio monopoly in a city of substantial size. ^{12/} That Community sought to preserve its original monopoly in Vineland is, perhaps, the most salient reason for a diversification preference to the Hendricksons. However, such a preference need not, and does not, rest on the fact of WWBZ's protest of the original WDWL grant, since it is basic "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Policy Statement, Note 4, quoting the Supreme Court in Associated Press v. United States, 326 U.S. 1, 20. In the foregoing connection, the Commission stated:

"That it is important in a free society to prevent a concentration of control of the sources of news and opinion and, particularly, that government should not create such a concentration, is equally apparent, and well established."

(Emphasis added.) See Policy Statement, Note 4, and cases cited.

An award here to Community would concentrate in that licensee the two most powerful and the only two unlimited stations in Vineland, and leave

a daytime only station as their sole radio competition. On the other hand, a grant to the Hendricksons would place the two full time facilities with different licensees, thereby assuring competition in Vineland both daytime and nighttime.^{13/} Based on the above, it is clear that the Hendricksons must be awarded a significant preference in this proceeding.

12. Aside from the monopoly and competition questions, it is only through a grant to the Hendricksons that Vineland residents would be assured of a choice of programs during all nighttime hours. The Board has reference here to the applicants' respective proposals to duplicate

^{12/} Pending in Commission files are two television applications for a new television station on Channel 65, the one television channel allocated to Vineland. The Board is not informed as to whether either of the applications will be granted by the Commission. Neither of the applicants now before the Board appears to be associated with either television venture.

^{13/} So far as the Board is informed, the record is silent as to the presence in the area of reception services from stations located outside the area, or whether such stations (if any) presently provide effective competition for WWBZ. The burden of producing such evidence was upon Community, since it is the applicant against which the diversification preference runs. See Windber Community Broadcasting System, 34 F.C.C. 571, 577, 25 R.R. 143, 152 (Rev. Bd. 1963).

portions of their existing AM programming.^{14/} The Hendricksons' WDVL is presently on the air from 8:45 a.m. until 4:45 p.m., Monday-through-Saturday, and from 8:30 a.m. until 4:45 on Sunday -- a total of 56.25 hours per week. They propose to operate the FM station from 7:00 a.m. until 11:00 p.m., Monday-through-Saturday, and from 8:30 a.m. until 11:00 p.m. on Sunday -- a total of 110.5 hours per week. The Hendricksons proposed to duplicate on FM their present AM programming in its entirety, with new FM programming from 7:00-to-8:45 a.m., Monday-through-Saturday, and from 4:45-to-11:00 p.m., Monday-through-Sunday; in all, the new FM programming would consume 54.25 hours per week.

13. Community's WWBZ is presently on the air from just before 6:00 a.m. until just after midnight, Monday-through-Saturday, and from just before 8:00 a.m. until just after midnight on Sunday -- a total of 124+ hours per week. With the commencement of licensed operations, Community's FM operation would be on a duplicated basis except during the following hours, when separate FM programming would be offered: 3:05-to-6:00 p.m., and 8:05-to-11:00 p.m., Monday-through-Saturday, and

^{14/} The Commission has described such duplication as a "wasteful and inefficient use of two frequencies to bring a single broadcast program to the same receiver location -- a situation which is undesirable and which should not be permitted to continue unless there are substantial counter-vailing benefits." See Amendment of Part 73 . . ., 4 R.R. 2d 1567, 1576. Section 73.242 of the Rules now limits FM stations in cities of over 100,000 persons to 50% in the time which they may devote to the duplication of the programming of an AM station owned by the same licensee in the same local area. Because Vineland's population is less than 100,000, the foregoing rule does not serve to disqualify either of the proposals herein. Nevertheless, the rule itself and the Commission's pronouncements with respect thereto make it clear that differences between FM applicants insofar as duplication is concerned should not be ignored in the comparative process. Cf. para. 3, dissenting opinion of Commissioner Cox in The Purchase Broadcasting Co., Public Notice of September 20, 1965 (Mimeo No. 73637). In the Board's view, the difference can be considered (in this case) under either the diversification or the programming factor; to consider it under both factors, however, would result in a double weighing of a single difference.

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7:00-8:00 p.m. on Sunday -- a total of 36 hours per week.^{15/}

14. From the above it is seen that, during the prime nighttime listening hours (6:00-11:00 p.m.), the Hendricksons would present all new programs; and that Community would duplicate with respect to 16.5 hours, and have new programming during 18.5 hours. In other words, the Hendricksons would, in fact, bring a new nighttime service to Vineland, while Community's would be new only in the amount of just over 50%. The Commission's diversification policies are stated in terms of assuring that listeners have a choice as to the sources of programs, and

implied therein, of course, is a concern that they have a choice of programming as well. In view thereof, the duplication aspects of the proposal are regarded by the Board as increasing the Hendricksons' overall preference under the diversification factor to a substantial one.

^{15/} On the second and fourth Tuesdays of each month, however, the FM station would duplicate WWBZ's live broadcasts of the meetings of Vineland's City Council. The findings as to the commencement of Community's separate FM programming reflect a view of the record in the light most favorable to that applicant. The Community application which the Commission designated for hearing did not specify a commencement time other than that "at some practicable time following the establishment of the FM station it will commence FM programming in the area of music." The time at which separate FM programming was to be carried was stated as "during certain evening and nighttime hours." Without amendment of the application (see, here, counsel's statements at Tr. 30-31: "Our proposal is basically duplication I will file a petition for leave to amend that will specify programming."), Community offered testimony that separate FM programming (during afternoon as well as "evening and nighttime" hours) would be instituted after the completion of program tests, and immediately upon the issuance of a license by the Commission. (Tr. 190) In light of the vagueness of the declarations in the application, it is doubtful that the testimony should have been admitted. In the same connection, see Tr. 192, where it was testified that Community would offer separate FM programming after the addition of a separate FM studio; since Community's application specifies only \$1,000 for "[a]cquiring, remodeling or constructing buildings", (Section III, Item 1.a.), it is extremely doubtful that Community originally contemplated a separate FM studio during its first year of FM operation. Notwithstanding what appear to be substantial variances from the application, the testimony involved is accepted. However, no weight is given (because of its vagueness) the assertion that "WWBZ-FM will aim to develop a separate and independent FM programming designed for a separate FM-only audience." (Community application, Exhibit 3)

III. Best Practicable Service

A. Participation by Owners

1. Community

15. The other of the Commission's two primary objectives in the comparison process is that "the best practicable service" be

provided the public. Prior to the Policy Statement, the broadcast experience factor and the area familiarity factors of local residence, civic participation and diversity of business interests^{16/} were evaluated per se, as essential elements in the determination of which of the competing applicants offered the greatest likelihood of effectuating the programming respectively proposed. Now, however, the foregoing factors are of varying significance,^{17/} depending on the degree to which the principals involved would be integrated into the operation of the station proposed. The Commission has consistently regarded integration as a factor to be considered in the decisional process, and the Policy Statement specifically declares that it is a factor of "substantial importance." Even absent such a pronouncement, the treatment of the area familiarity and broadcast experience criteria as weighting factors under integration makes it unmistakably clear that the latter criterion is the key one in the determination of which applicant offers the greatest likelihood of "sensitivity to an area's changing needs, and of programming designed to serve these needs." See Policy Statement, 1 F.C.C. 2d 395, 5 R.R. 2d 1909.

16. The Policy Statement states that, under the integration factor, "no credit will be given to the participation of any person who will not devote to the station substantial amounts of time on a daily basis." Community's stock is held by seven individuals and two estates. With respect to two of the individuals^{18/} and the two estates,^{19/} no participation of any type is proposed by Community; these four stockholders represent a total of 19% of Community's stock. Each of the other five stockholders is a director of the corporation, and each is a long-term local resident. Each has engaged in sufficient "local activities [to indicate] a knowledge of and interest in the welfare of

^{16/} See Note 3, supra.

^{17/} "Past participation in civic affairs will be considered as a part of a participating owner's local residence background, as will any other local activities indicating a knowledge of and interest in the welfare of the community. Mere diversity of business interests will not be considered." Policy Statement, 1 F.C.C. 2d 396, 5 R.R. 2d 1910.

^{18/} Henry T. Bullock of Vineland (9.5%) and Roy Yates of Port Norris, New Jersey (2.0%); Port Norris is 16 miles south of Vineland.

^{19/} Estate of Peter Lavari (5%) and Estate of John J. Daneri (2.5%); no information as to the area familiarity of those having the right to vote these shares was adduced at the hearing.

the community," ^{20/} and each can claim years of experience as officers and/or directors of a broadcast station. ^{21/} These five persons are Joseph M. Bullock (20%, president); Lewis D. DeMarco (51.5%, vice president); Moey L. Lihn (5%, secretary); Ernest A. Zucca (2.5%, treasurer); and Lemuel B. Newcomb (2%). As the Examiners' findings (paras. 33-34) and conclusions (para. 9) reflect, none of these stockholders would "devote any time to the day-to-day management or participate either full or part time in the operation of the proposed FM station." (Conclusions, para. 9). Supervision of day-to-day operations has been delegated by the stockholders to Robert C. Crager, general manager, who has no ownership interest in the corporation. (Findings, para. 33). In view of the above, Community has achieved no more than a zero score in terms of participation by its owners in the proposed station's day-to-day affairs.

17. There remains here the question of the credit to be extended Community for its showings as to area knowledge and interest and broadcast experience. In its Policy Statement, the Commission has indicated that (a) "a slight credit will be given for the local residence" of owners "who will devote some time to station affairs"; (b) "a very slight credit will similarly be given for experience not accompanied by full-time participation"; and (c) "no credit will be given either the local residence or experience of any person who will not put his knowledge of the community (or area) or experience to use in the operation of the station."

To the extent that Community offers participation, it is only by the five directors; and they would participate in the future as they have in the past. The directors meet twice a month and "keep currently informed on problems and operations of Station WWBZ as a result of the attendance of Crager at these sessions which are held in the station." (Conclusions, para. 9). Mr. DeMarco, the majority stockholder, regularly attends the meetings, and he otherwise visits the station on an average of twice per week. Mr. Lihn also regularly attends the meetings, signs payroll checks, and discusses station affairs with Crager three times a week, when the two meet while picking up mail at the Vineland post office. Messrs. Zucca and Newcomb have "fairly high records of attendance" at directors' meetings, but have little else to do with the station; each vacations in Florida for several months each winter. Mr. Bullock attends three or four meetings per year, and spends six months each year in Florida, from where he keeps in touch with Mr. DeMarco by letter or telephone with reference to station business.

18. In the Board's view, no credit whatever can be extended Community for Mr. Bullock's local knowledge or experience, and only scant

^{20/} See Note 17, *supra*. The president, Joseph M. Bullock (20%) resided in Vineland for over 40 years; he now resides in Milmay, New Jersey, which is but 9 miles from Vineland. See, however, para. 17, *infra*.

^{21/} It does not appear that any of them has ever held a "staff position", a type of experience which the Commission has stated should be accorded "particular weight." See *Policy Statement*, 1 F.C.C. 2d 395, 5 R.R. 2d 1909.

credit can be extended for Messrs. Zucca's and Newcomb's. Weighing against these stockholders are their records of minimal participation in station affairs, their consequent lack of meaningful broadcast experience, and their extended absences from the area. ^{22/} A very slight credit can be given Community for the knowledge and experience of Messrs. DeMarco and Lihn, who at least discuss station affairs with Crager other than at directors' meetings. ^{23/} Adding up the above

credits, it is the Board's conclusion that the credit due Community for its total showings in the above areas is something less than "very slight." (See Policy Statement, 1 F.C.C. 2d 396, 5 R.R. 2d 1911). Consequently, for the whole of the integration-knowledge-experience criterion, only a barely perceptible trace of credit can be extended.

2. The Hendrickses

19. On the above overall criterion, the preference due the Hendrickses is a substantial one. Mortimer Hendrickson and Vivian Eliza Hendrickson (husband and wife) are each 50% partners in the Hendrickson proposal. Mr. Hendrickson assisted in the construction of WDWL, which went on the air in August, 1959. He has served as general manager of the station since that time, supervising its operations, and performing sales, engineering and announcing duties. He has spent approximately 60 hours per week on WDWL's affairs since it went on the air. With a grant of the FM application, he would serve as general manager of both the AM and FM stations on a full time basis, proposing to devote a minimum of 50 hours per week to management and other duties. Some diminution of the proposal is warranted from the fact that he would be dividing his time between the AM and FM outlets. Nevertheless, the record makes clear that he would be in close supervision of station affairs on a daily basis, and this is the primary goal of the Commission's integration policies.

20. The Hendrickses' integration proposal is significantly enhanced by their showings as to Mr. Hendrickson's area knowledge and interest and broadcast experience. To give Mr. Hendrickson a high score for broadcast experience, one need not go beyond the fact that he has served as general manager and jack-of-all trades at his Vineland station

^{22/} Cf. the Veterans case, supra, 38 F.C.C. 50, 4 R.R. 2d 407, where with respect to a finding that an applicant's proposed general manager (the principal stockholder) would spend three or four months each year in Florida, the Commission declared that it "cannot concede . . . that the responsibilities associated with the position of general manager can be satisfactorily discharged for months at a time, on the basis of daily reports and long-distance phone calls."

^{23/} But see para. 28, infra, as to the nature of some of Mr. DeMarco's discussions with Mr. Crager.

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since 1959. Additionally, however, the Examiners' findings (para. 59) show that his broadcast experience dates back to 1938, and that, over the years, he has performed virtually every type of duty associated with a radio station. In what appears to the Board to be a wholly unrealistic approach to the question, the Examiners refused to give Mr. Hendrickson any substantial credit under the area familiarity criteria. True, his showings cannot be said to equate with the long-term local residence of the majority of the Community stockholders, nor with the latter's impressive showings with respect to civic participation. From the following facts, however, it can safely be concluded that he has a high degree of "knowledge of and interest in the welfare of the community" ^{24/} (and this, of course, is what the area familiarity criteria have been about since well before the Policy Statement): (a) Mr. Hendrickson lived for 30 years in Pitman, New Jersey, which is but 15 miles north of Vineland, and well within the FM station's proposed service area; ^{25/} (b) much of his non-WDVL radio experience has been in New Jersey, and within the WDVL service area; (c) he has resided since 1953 at Blackwood, New Jersey, which is 21 miles north of Vineland, and within the foregoing area; (d) most important, he has been in active supervision of an AM station in Vineland since 1959, commuting from Blackwood on a daily basis; and (e) although he has no extensive record of civic participation in Vineland, the fact of his having carried programs and

announcements on behalf of local organizations (see Examiners' findings, para. 72) is an indication that he otherwise has a knowledge of their needs.

21. Mrs. Vivian Eliza Hendrickson is employed as the Superintendent of the Camden County Psychiatric Hospital at Lakeland, New Jersey, and her hours of duty are from 9:00 a.m. until 4:00 p.m., Monday-through-Friday. She proposes to devote a minimum of 16 hours weekly to the two outlets, and this proposal is entirely consistent with her past practice with respect to the AM station. Thus, since WDVL commenced operations in 1959, she has engaged in administrative, clerical and programming duties at the station, generally being there during the broadcast day on Saturdays and Sundays, and occasionally at night during the week. Since the station went on the air, Mrs. Hendrickson has prepared and conducted on the air a half-hour children's program on Saturday mornings, called "Children's Story Window"; she would continue to do this with a grant of the FM permit.

22. No integration credit can be given the Hendricksons for Mrs. Hendrickson's proposal, for under the Policy Statement the standard is in terms of substantial amounts of time on a daily basis. Notwithstanding the above, and because Mrs. Hendrickson will devote some time to

^{24/} See Note 17, supra.

^{25/} "Generally speaking, residence in the principal community to be served will be of primary importance, closely followed by residence outside the community, but within the proposed service area." See Policy Statement, 1 F.C.C. 2d 396, 5 R.R. 2d 1910 (emphasis added).

station affairs, she is entitled to a slight credit for local knowledge and interest, and a very slight credit for broadcast experience. With the foregoing credits, and with Mr. Hendrickson's showings as to local knowledge and broadcast experience regarded by the Board as almost wholly compensating for the diminution warranted by his continued AM

responsibilities, the Board rates the Hendricksons' combined integration-knowledge-experience showings as very near 50%. This is an extremely good score when compared with Community's zero rating, and entitles the Hendricksons to a substantial preference in this area of comparison.

B. Proposed Program Service

23. On pages 6-7 of its Policy Statement, the Commission has indicated that differences between program proposals should be accorded decisional significance only if they are "material and substantial" to a point showing "superior devotion to public service", as where one applicant proposes "unusual attention to local community matters for which there is a demonstrated need." The Statement goes on to reveal the expectation -- based on the Commission's "experience with the similarity of the program plans of competing applicants" -- that substantial differences with respect to program proposals and program planning elements will not normally appear. The soundness and validity of the foregoing approach is underscored by the facts in the instant case, which show that neither applicant distinguished itself in terms either of planning or of programming generally.^{26/}

24. Community's exclusively-FM programming would consist of "classical", "semi-classical" and "symphonic" music, some of the programs involved to be interrupted by news and weather reports. The Hendricksons' exclusively-FM programming would consist of "country", "hymnal", "semi-classical" and "quiet . . . instrumental" music, with five-minute news, news-and-weather, and sports programs scattered through the broadcast week. The most pronounced difference between the applicants in the overall area of programming lies in the manner in which the respective proposals were prepared: Community's was prepared by Mr. Crager (the general manager) and approved by the board of directors (only Messrs. DeMarco and Lihn present) without change; the Hendricksons' was prepared by Mrs. Hendrickson after discussions with Mr. Hendrickson. Thus, the Hendricksons' has the advantage of

owner-participation in program planning; however, because they (like Mr. Crager) were able to come up only with a music-and-news format for the FM-only aspects of their proposal, the significance which would ordinarily attach to the difference ^{27/} cannot, in the Board's view be here credited.

^{26/} The reference here is to the programs to be presented only on FM. Each applicant presently carries meritorious programs on its AM station, and these programs would be carried on FM as well. Thus, the programming to be duplicated is "past programming", and to treat it here as well as under "past broadcast record" would result in dual consideration of the same facts.

^{27/} Cf. the Veterans case, supra, 38 F.C.C. 45 and 55, 4 R.R. 2d 402 and 411.

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In sum, the Board agrees with the Examiners' overall conclusion (Conclusions, para. 16) that, "Although differences between the two proposals are perceivable, they are not of the sort which merit a comparative preference for either applicant." ^{28/}

C. Past Broadcast Record

1. In General

25. A substantial portion of the Initial Decision is devoted to findings concerning the applicants' records in the operation of standard broadcast stations. ^{29/} In weighing those findings, the Examiners concluded that there was but one difference of substantial significance between the applicants; namely, that:

"While the Hendricksons have been mindful of the public service needs of [the Vineland] area, its efforts in this area have not been as assiduous as those of Community or produced such a notable record of accomplishment."

Based on the foregoing differences, the Examiners awarded to Community "a distinct preference on the factor of past programming." (Conclusions, para. 13). Even without the Policy Statement, the Board would

have difficulty in sustaining a significant preference for Community under the past broadcast record criterion, it being of the view that the Examiners gave inadequate (or no) weight to the following considerations: (a) WWBZ's impressive record of cooperating with local public service organizations was accomplished with but token participation in station affairs by Community's stockholders; (b) the criterion embraces not only the programming itself, but also the licensee's record of complying with commitments made to the Commission; (c) WWBZ, by reason of its higher daytime power and nighttime authority, is inherently more attractive than WDVL to organizations with messages for the public, and, a fairer method of comparison would be in terms of "what the stations did with what they had."^{30/}

^{28/} The Examiners described the two proposals as "essentially well-balanced"; to the extent that the FM proposals include programming (duplicated) in the non-entertainment and non-news categories, this is so. (Compare paras. 39-40 and para. 67 of the Examiners' findings.)

^{29/} Community's stockholders have been associated only with WWBZ in Vineland. In addition to their interests in WDVL in Vineland, the Hendricksons operated WHAP (Hopewell, Virginia) in the 1953-54 period.

^{30/} The following will illustrate the Board's point: In para. 13 of their conclusions, the Examiners stress that WWBZ "has regularly carried as 'live' programming the meetings of the Vineland City Council." Such meetings, however, are conducted at night (see Note 16 to para. 37 of the Examiners' findings), and a daytime only station should not suffer comparatively for an inability to carry them.

26. The above views are in accord with the guidelines set forth by the Commission in its Policy Statement (1 F.C.C. 2d 398, 5 R.R. 2d 1912-13). First, the pronouncements appear to indicate that to receive anything more than a slight credit for a good past record, it is not enough that the claimant has an ownership interest in the station involved: he must also have significantly participated in the operation

of the station.^{31/} Second, the Statement makes clear that "a significant failure to carry out representations made to the Commission" is a factor to be considered in assessing a station's overall performance. And third, the Commission is not interested in a point-by-point comparison between the applicants; rather, the principal question is whether the station involved has been significantly above or below "average." Accordingly (as the Board reads the Statement), if each of the two applicants claiming past broadcast record is rated as "average", that ends the matter, and no comparison need be made to determine whether one or the other is at the high or low end of the "average" classification. Thus, a preference would be in order only if one of the records was "either unusually good or unusually poor."^{32/}

2. Community

27. The testimony of Messrs. DeMarco, Bullock, and Crager, more so than the Examiners' findings at paras. 33-34 of the Initial Decision, is persuasive of the fact that the delegation of responsibility and authority with respect to all significant station affairs is almost total. As indicated in para. 17, supra, directors Zucca, Newcomb and Bullock spend a portion of each year in Florida; and, except for directors' meetings, no director other than Mr. DeMarco regularly visits the station. Until he was injured in an automobile accident in 1959, Mr. Bullock (president and second largest stockholder -- 20%) was the most active of Community's stockholders. (Tr. 843, 934) On his infrequent daytime visits to the station, Mr. Bullock now looks "to see that the building is all there, for one thing, they haven't knocked anything down. I talk to the employees. Other than that, not very much." (Tr. 2640) As examples of station matters concerning

^{31/} The Board has not overlooked Wabash Valley Broadcasting Corp., 35 F.C.C. 677, 679, 1 R.R. 2d 573, 577 (1963), where a renewal licensee was given full credit for a good past broadcast record notwithstanding a lack of integration by its owners. Aside from the facts that Wabash preceded the Policy Statement, and was a case wherein an applicant was

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^{31/} [continued from preceding page]
contending with a licensee seeking renewal of license, there was no evidence in that proceeding (as there is in this -- see para. 30, *infra*) that the licensee had ever suffered from the selection of a manager who was indifferent to public interest problems or neglectful of the station's responsibilities to the Commission. See Findings, para. 51 and 56.

^{32/} The Policy Statement does not cover every factual situation that might arise, as where each of two records is found to be either unusually good or unusually poor. Possibly, in such a situation, a preference or demerit would be in order, depending on the respective departures from average; however, that situation is not now before the Board, and the question need not be here decided.

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which Mr. DeMarco has written him, he cited one where "There was to be a mortgage paid off and he wrote me asking should we pay it off and what funds we should use to pay it off, (Tr. 937-38) and another where "He wrote me a letter about one of the employees was going to quit or get a raise." (Tr. 938)

28. Mr. DeMarco (vice president and largest stockholder -- 51.5%) is now the most active of the stockholders. (Tr. 842-43) He visits the station (aside from directors' meetings) "[o]n the average of twice a week" (Tr. 837) or "[o]nce, twice a month, on average" (Tr. 433) depending on whether his own or Mr. Crager's testimony is accepted. ^{33/} His own testimony as to what he does on the occasions of the visits is as follows:

"Well, when I visit the station, I first will check and see if all is operating well, if our staff is all there, who is on duty. I will ask some of the staff if there is anything not working properly, if there is anything they want of me. I keep a close check on the building itself, particularly at night time. I hold surprise visits to the station to make sure that the windows are locked, the doors are locked, just checking up on our employees." (Tr. 837)

Consistent with the foregoing is Mr. Crager's testimony that Mr. DeMarco will

"[c]ome in; walk through the studios; look the building over; ask me how things are going; make recommendations that he might have on his mind. . . . I recall one instance where the grass hadn't been cut recently, and he thought it would be a good idea if the grass were cut. That sort of thing. . . . He brought some friends out, and was looking over the office, to show them the building." (Tr. 436)

Additionally, Mr. DeMarco once "came up to talk about the possibility of getting big plastic call letters put on the side of the building." (Tr. 441)

When Mr. DeMarco speaks to Mr. Crager by phone, it is about

". . . various subjects, particularly for the last year, it practically always winds up that if the FM -- 'have you heard anything? Is there anything new? Must we get anything? How is business, how is collection? Is the help satisfied? Any problems?' " (Tr. 860)

^{33/} The Board is reluctant to discredit any testimony if there is a reasonable basis for its acceptance. In light of Mr. DeMarco's testimony (set forth below) that he holds "surprise visits", it can be reasoned that Mr. Crager sees him at the station but once or twice a month, and that his other visits are after Mr. Crager's tour of duty.

Although Mr. DeMarco "indirectly" secures business for the station through his other business interests, he has nothing to do with the signing of contracts with advertisers. (Tr. 860) He listens to WWBZ when he is in his car, and when he is home for breakfast, dinner or lunch. (Tr. 838) He does not, however, listen at night to the station unless he is in his car. (Tr. 856-57) He does "not consciously" listen to the station when he is in his office. (Tr. 856) He receives copies of correspondence between Mr. Crager and Community's attorneys, but not of

"routine, business correspondence." (Tr. 839) As a rule, he does not look at program logs. (Tr. 860)

29. The most valid conclusion that can be drawn from the testimony set forth above is that the Community stockholders are, at best, "resident absentee owners", having little more than an investor's concern with respect to station affairs. Conspicuously absent from the directors' testimony is any contention that they play other than minor, "consultative" roles in the station's responses to the area's "changing local interests and needs", (Policy Statement, 1 F.C.C. 2d 395-96, 5 R.R. 2d 1910), and convincing of the fact that they do not is the evidence with respect to the formulation of the FM-only programming. (See para. 24, supra.) Accordingly, and under the Board's interpretation of the Policy Statement, (see para. 26, supra), it is the Board's view that Community's stockholders should not be given significant credit even if WWBZ's past broadcast record is held to be above average. Nevertheless, and because the Policy Statement is not crystal clear on the point, the Board will here follow a "proof-of-the-pudding" approach to WWBZ's past record, and will extend significant credit if that record can be regarded as "unusually good" within the meaning of the pronouncements of the Policy Statement.

30. A brief review of certain aspects of WWBZ's past history and operation will serve to place the Board's conclusions in proper perspective. In 1955, following an evidentiary hearing and an Initial Decision adverse to WWBZ, the Commission issued a Decision denying Community's renewal application for the station. See Community Broadcasting Service, Inc., 13 R.R. 179. Among other things, it was concluded by the Commission that WWBZ had broadcast horse-race information of substantial use to, and used by, persons engaged in illegal gambling activities; that substantially all of the licensee's responsibility for the programming of the station had been placed in the hands of the station's manager, a paid employee; that WWBZ's directors had neglected their responsibilities, which, in effect, had been transferred to the manager,

who, in turn, was indifferent to the public interest problem presented; and that, accordingly, Community had failed to carry out its responsibilities as a licensee.

31. In 1957, following a reopening of the record to afford Community further hearing, the Commission upheld a Supplemental Initial Decision recommending a renewal of WWBZ's license. See Community Broadcasting Service, Inc., 22 F.C.C. 1044, 14 R.R. 1226. In the foregoing connection, the record of the further hearing had established that drastic

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changes had occurred in the station's programming and overall operations; that the former station manager and the former program director had terminated their services with the station; that, in the previous two years, there had been no improper delegation of authority to the station manager; and that all broadcasts of horse-race information had stopped. In relying upon Community to continue to operate in accordance with the public interest, convenience and necessity, the renewal decision stated, in part, as follows:

"As a result of the experience gained by [Community's officers and directors] during the course of this proceeding, it appears that they are now fully aware of their public service responsibilities as the owners of a corporate licensee of broadcast facilities, as evidenced by the exceptional performance of the station in its public service programming since the time of the release of the original initial decision herein. The principal cause of the irregularities has been removed permanently and the immediate or day-to-day management of the facility is now in competent and reliable hands."

The record in the instant proceeding contains no evidence that the horse-race broadcasts which had resulted in the renewal hearing have

been presented by WWBZ since the renewal of its license in 1957. Based on this fact, and because of the remoteness in time of the broadcasts in question, the Board agrees with the Examiners that such broadcasts should not result in a demerit against Community under the past broadcast record criterion.

32. From the above it is seen that Community's renewal difficulties stemmed from a neglect of responsibility on the part of Community's directors, and an almost total delegation of such responsibility to a station manager overly indifferent thereto. It is equally clear that the Commission's ultimate renewal was predicated on evidence that the directors had come to realize their responsibilities as the stewards of a corporate licensee and that reliance could be placed on them to prevent future irregularities at their station. The instant record reflects that, in recent years, Community's station managers have been more aware of licensee-responsibility than was the case in the period preceding its renewal hearing. Nevertheless, the evidence discussed in paras. 27-29, supra, compels the conclusions that (a) the delegations of responsibility to Mr. Crager are, at the present time, nearly as complete as they were in the early 1950's; and (b) were "irregularities" now to develop with respect to WWBZ's overall operation, under Mr. Crager or some future manager, it is as likely as not that the station's ownership would be unaware of them. Indeed, the evidence in this proceeding reveals that this is precisely what has occurred at the station.

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33. The irregularity referred to in the previous paragraph is the situation involving WWBZ's recently-ended practice of "double-billing." ^{34/} Briefly, the facts are these: As indicated in para. 10, supra, Community protested, in 1957, a grant by the Commission authorizing WDVH. Among the grounds of the protest (sworn to by Mr. Bullock) was one that the Hendricksons, at a time when they were operating Station WHAP, Hopewell, Virginia (1953-54), had engaged in

double billing, described in the protest as "a form of deceit and . . . a practice which should be condemned by the Commission." (Tr. 2615) At the time of the protest, Community's counsel explained the details of double billing to Mr. Bullock and at least one other director, (Tr. 2609-12, 2617) and a copy of the protest was made a part of Community's corporate minutes of April 1, 1957. (Tr. 2624-25) Mr. DeMarco testified that he did not know until 1962 what was meant by the term "double billing", (Tr. 2325) although he believes that he read the protest in 1957.^{35/} (Tr. 2331) At the very time of the protest, and for the five previous years, WWBZ was, itself, engaged in the double billing practice in Vine-land. (Tr. 2632) The practice was terminated by Mr. Crager in March, 1962 (approximately one year after he joined the station as manager), following the release by the Commission of a public notice (see Note 2, supra), condemning the practice. (Initial Decision, findings, para. 56) Until the time of the termination, none of Community's directors knew that their station was engaged in the practice. (Ibid.) Upon receipt of the public notice, Mr. Crager (who, like the directors, did not know that WWBZ was double billing) took up the matter with the station's commercial manager, and learned that four accounts were involved; he directed that the practice be stopped, and reported his findings and action at the next meeting of the board of directors. (Ibid.) As far as Mr. Bullock knows, the station does not now double bill; his opinion is based on the fact that "Mr. DeMarco has checked with all the customers that were alleged to be double billed", "to make sure that the station is not furnishing double bills to [them]." (Tr. 2651-52) How this system of checking protects "a manufacturer or national advertiser" (Note 2, supra) from a defrauding local advertiser and a cooperating time-salesman was not explained on the record.

34. Like the Examiners, the Board agrees that the long duration of the practice at WWBZ, the fact that it was terminated only in recent

^{34/} See para. 3 and Note 2, supra. In rules (Sections 73.124, 73.229 and 73.678 effective November 29, 1965, double billing practices by broadcast stations are specifically prohibited. See Amendment of Part 73 . . ., FCC 65-951. See, also, Applicability of Fraudulent Billing Rule (Public Notice), FCC 65-952 (released October 22, 1965).

^{35/} Mr. DeMarco's testimony that he did not know the meaning of the term can be accepted on the reasoning that he was not one of the directors to whom Community's counsel explained it. Cf. Note 33, supra. However, lack of knowledge as to the meaning of the term is no excuse for the failure to uncover the practice, which is deceitful by whatever name it is known.

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years, and the number of accounts involved warrant a demerit against Community. Of greater concern to the Board, however, is the continued, casual approach to responsibility on the part of Community's directors,^{36/} notwithstanding that previous neglect on their part had resulted in other "irregularities" at the station. Their unawareness of the practice at the station -- in the face of at least implied commitments at the time of their 1957 renewal to be more attentive to station affairs -- reflects so adversely against them as to demand the assessment of a substantial demerit against their ownership records. The ease with which Mr. Crager uncovered the practice underscores the directors' neglect of their responsibilities. It is clear to the Board that, but for the Commission's notice and Mr. Crager's concern at the time he received it, the double billing practice might still be in effect at the station. It is no answer here that Community has engaged a manager with a high sense of responsibility and that, for that reason, Community should escape criticism: the record shows that, over the years, other of Community's managers either overlooked or ignored the practice; in any event, the responsibilities inherent in the acceptance of an authorization from the Commission settles on owners and not employees.

35. Examination of the analyses of WWBZ's composite weeks for 1962 and 1963, and the other programming evidence of record,

confirms the Examiners' conclusion (Conclusions, para. 13) that the station "has carried a balanced program schedule which takes account generally of the program needs of the Vineland area listeners . . . [and] has supplied a varied program fare that offers to the listeners programs in all categories which the Commission deems representative of the programming needs in most areas (i.e., entertainment, religious, agricultural, educational, news, discussion and talks)." The station's average percentages (for the two years) for non-entertainment, sustaining and live programs are not unusual, nor are its figures for commercial and noncommercial spot announcements. To this point the schedule must be adjudged as "within the bounds of average performance." (Policy Statement, 1 F.C.C. 2d 397, 5 R.R. 2d 1911.) Placing the station's programming substantially above average, however, is the record evidence of the station's "unusual attention to the public's needs and interests, such as special sensitivity to [the] area's changing needs through flexibility of local programs designed to meet those needs." (Ibid.) Paragraph 49 of the Examiners' findings, wherein there is summarized the testimony of "sixteen witnesses representing various governmental, church, school and public service groups and organizations in Vineland and its vicinity", ^{37/} amply supports their conclusion (Conclusions, para. 13) that "Community has demonstrated a record of outstanding accomplishment in its attention to and satisfaction of the local needs of the Vineland area for 'public service' programs." On

^{36/} For the Commission's attitude with respect to a president-director who "did not preside, and . . . did not direct", and who therefore offered a "possibility of a casual or careless approach to responsibility", see the Veterans case, supra, 38 F.C.C. 32-33, 4 R.R. 2d 389.

^{37/} Paragraph 49 covers well over three pages of the Initial Decision.

the basis of the above, it is clear that Community is entitled to a substantial credit for a programming record beyond "the bounds of average performance."

36. The findings at paras. 54-55 of the Initial Decision reveal on the part of Community a number of logging errors, particularly in the mislogging of announcements promoting commercially-sponsored broadcasts of basketball and football games as noncommercial spot announcements. ^{38/} There is no suggestion that the mislogging was a result of an intent to falsify the logs or to otherwise deceive the Commission, and, consistent with the Commission's policy in situations of this kind, no debit will be assessed against Community's programming record. ^{39/}

37. Community's record in complying with its announced spot announcement policy is treated in the Initial Decision at para. 53 of the Findings and para. 15 of the Conclusions. The policy -- stated to the Commission in WWBZ's 1960 and 1963 renewal applications (as well as in the instant FM application) -- is "generally" to limit the number of such announcements to four in any 14 1/2-minute programming segment. However, the station's 1962 composite week shows that, during that week, WWBZ presented five or more spot announcements in 52 of the specified segments. The Examiners termed the foregoing departures from policy "infrequent", and concluded that the station "generally . . . adhered to the declared policy." Of apparent influence to the Examiners was the fact that in 111 14 1/2-minute segments, WWBZ presented no spot announcements. However, 45 of the 111 segments "had a commercially sponsored program within them", (Tr. 2003-05); thus, an hour-long church program, sponsored by the church involved, was regarded as free of spot announcements, since "there [were] no commercial announcements in it." (Tr. 2005-06) In any event, the question on the Commission's application form (see FCC Form 301, Section IV, Item 3b) is not in terms of "averages", and the Board cannot accept in mitigation of the station's departure from its professed

policy the fact that it has time-segments during which no spot announcements are carried. In the Board's view, the station's demonstrated willingness to violate its policies on the occasions of "increased demands from sponsors" warrants at least a slight demerit against Community's overall broadcast record.

^{38/} In their Exception No. 5, the Hendricksons contend for a lack of candor by Mr. Crager in testifying concerning the mislogged promotional spots. The Board has examined the testimony in question and concludes that while it is somewhat uneven, it is not sufficiently so to warrant the label sought by the exception.

^{39/} Cf. the Veterans case, supra, 38 F.C.C. 53, 4 R.R. 2d 409-10, and Florida Gulfcoast Broadcasters, Inc., 32 F.C.C. 197, 206, 23 R.R. 1, 12-13 (1962).

38. The Board's conclusions as to Community's past broadcast record may be summarized as follows: (a) Community has substantially exceeded average performance in terms of sensitivity and attention to the area's needs for "public service" programming; (b) a slight demerit attaches to the record by reason of the double billing practices engaged in by the station in the 1952-62 period; (c) a substantial demerit must be assessed for ownership's failure to honor its commitments to be more attentive to station affairs; and (d) a slight demerit is warranted by the fact of the station's failure to adhere more closely to its declared policy with respect to the frequency of spot announcements. Weighing the meritorious feature of Community's record against the enumerated deficiencies, it is the Board's view that the overall record falls within the range of average to slightly above average. Giving maximum credit for the station's accomplishments in the "public service" field, the Board, for further purposes herein, will regard the record as deserving of the higher rating.

3. The Hendricksons

39. At the outset, it may be noted that the Hendricksons' showings raise no question as to whether credit should be withheld from them for an "unusually good" record (should they have one) out of integration considerations. The Hendricksons have at all times controlled WDVL, and paras. 19-20, supra, establish that the WDVL record is their record.

40. Examination of the analyses of WDVL's composite weeks for 1962 and 1963, and the other programming evidence of record, confirms the Examiners' conclusions (Conclusions, para. 13) that the station "has carried a balanced program schedule which takes account generally of the program needs of the Vineland area listeners . . . [and] has supplied a varied program fare that offers to the listeners programs in all categories which the Commission deems representative of the programming needs in most areas (i.e., entertainment, religious, agricultural, educational, news, discussion and talks)." The station's average percentages (for the two years) for non-entertainment, sustaining and live programs are not unusual, ^{40/} nor are its figures for commercial and noncommercial announcements. To this point the schedule must be adjudged as "within the bounds of average performance." The same conclusion is warranted with respect to WDVL's "attention to the public's needs and interests, such as special sensitivity to [the] area's changing needs through flexibility of local programs designed to meet those needs." For, while the record supports the Examiners' conclusion that "the Hendricksons have been mindful of the public needs of [the] area", its efforts (unlike those of Community) have not been so extensive or fruitful as to merit for WDVL the label of "unusual attention" to such needs and interests.

^{40/} Actually, the percentage for sustaining programs (76%) is well above average; however, there is no evidence in the record that the 3-to-1 ratio of sustaining-to-commercial programs is maintained by the Hendricksons by design.

41. The findings at paras. 73-74 of the Initial Decision reveal on the part of the Hendricksons a number of logging errors, particularly, in the mislogging of certain commercial programs as sustaining, and the erroneous classification of certain other programs as to type. The same conclusion drawn with respect to Community's logging violations (para. 36, supra) is appropriate here, and no debit will be assessed against the Hendricksons' programming record.

42. The Hendricksons' spot announcement policy -- stated to the Commission in WDVL's 1960 and 1963 renewal applications (as well as in the instant FM application) -- is "generally" to limit such announcements to 60 seconds in length, with no more than 3 minutes of continuity in any 14 1/2-minute programming segment. During the 1962 composite week, WDVL departed from its policy on one occasion, when its continuity in a 14 1/2-minute segment totaled 4 minutes. ^{41/} Additionally, on Sunday, August 4, 1963, there was another departure: during the 14 1/2-minute segment ending at 1:30 p.m., the commercial continuity (10 half-minute spots) totaled 5 minutes. ^{42/} Thus, it has not been shown that WDVL violates its declared policy to any significant extent and no demerit attaches to the Hendricksons' overall broadcast record for such infrequent departures.

43. At paras. 77-80 of their findings, the Examiners found that, in the broadcast of WDVL's news programs, Mr. Hendrickson has made use of a number of out-of-town newspapers; and that certain of his testimony -- as to whether he "writes out" the newspaper items before using them in the station's newscasts -- "is not worthy of credence." The Examiners concluded, however,

"... that the above-noted adverse finding regarding the manner of the use of the newspapers by Mr. Hendrickson while delivering newscast would not adversely affect the qualifications of the Hendricksons to be the licensee of their proposed FM station, and is not to be viewed as requiring any demerit against them."

^{41/} On this occasion and on 3 other occasions during the composite week, WDWL presented more than 3 spots in a 14 1/2-minute segment (4 in 3 of the segments and 5 in the other). In none of the other 3 segments did the continuity exceed 3 minutes, and there were, therefore, no violations of the policy therein.

^{42/} In the next 14 1/2-minute segment, there were 4 more 30-second spots and, accordingly, 14 spots were presented in the two segments. (Actually, all of the 14 spots were presented between 1:16 and 1:36:30 p.m.) The 7 minutes of commercial continuity were on behalf of the 14 sponsors of the "Yiddish Hour", a one-hour program commencing at 1:00 p.m.; there was no other commercial continuity during the program.

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Notwithstanding the Examiners' holding that the Hendricksons' qualifications are not adversely affected by the facts concerning the newspaper usage, the Hendricksons protest in their exceptions that the Examiners have "put a cloud over Mr. Hendrickson despite their flat, unequivocal and clear recognition of the honesty and candour with which Mr. Hendrickson testified." ^{43/} In reviewing the matters advanced by the Hendricksons, the Board is persuaded that the adverse finding complained of principally stemmed from a failure by the Examiners to give sufficient consideration to Mr. Hendrickson's testimony (reported in the findings) that he "usually writes out items." (Emphasis supplied). Implicit in the quoted testimony is the admission that sometimes he does not write them out. So far as we are told, Mr. Hendrickson never testified that he wrote out the material for his own newscast of February 17, 1964; and a comparison of the transcript of that broadcast ^{44/} with the associated newspaper items lends support to his testimony that he does not "read directly from the paper", ^{45/} but "edits" the items as he reports them from the paper. ^{46/}

44. However, Mr. Hendrickson did testify (Tr. 2363) that he did write out the material for Mr. Morey's newscast of February 13, 1964. The Examiners refused to believe this on the following ground:

"It is most improbable that Mr. Hendrickson went through the tedious process of copying a paragraph or two from several news items in a daily newspaper with but few changes in wording, and for him to claim to have done so strains credulity beyond the breaking point."

The Board believes, however, that there are reasonable bases for an acceptance of the testimony: (a) the Examiners specifically concluded that Mr. Hendrickson displayed candor "in testifying generally on the use of newspapers as newscast sources"; (b) having admitted his substantial

^{43/} As previously indicated herein, Community filed no exceptions to the Initial Decision.

^{44/} At the direction of Mr. Crager, (Tr. 2178-79) WWBZ's chief engineer taped the whole of WDVL's broadcast week of February 13-19, 1964. (Tr. 2166) Typewritten transcripts of two of WDVL's news programs were admitted into evidence. Section 1.357 of the Rules barred the admission of the tapes themselves.

^{45/} The Board takes this testimony to mean that he does not read the items word-for-word. The Board agrees with the exceptors that "it would be sheer semantics to argue otherwise."

^{46/} For further support, see the Horton testimony reported in the penultimate sentence of para. 77 of the findings.

use of newspapers, ^{47/} and having admitted (Tr. 1431) that he "write[s] . . . down on a piece of paper" "the first paragraph of an item", ^{48/} there was no reason for him not to admit (if such were so) that he merely delivered "blocked out" items to Mr. Morey for the latter's on-the-air "editing"; ^{49/} and (c) as found by the Examiners, there are differences between the transcript in question and the associated news items.

45. Of greater substance than the above is the question of whether WDVL's use of newspapers can be said to constitute a type of "unfair

competition" -- a question to which neither the parties nor the Examiners addressed themselves. The Board has considered the findings in the light of what appear to be three of the leading cases on the point,^{50/}

^{47/} Apparently, less use now is made of newspaper items than formerly was the case. Thus, since March, 1964, the station has been a subscriber to Audio Pulse Beat, a news service which furnishes news on tapes and audio news by direct telephone line to its customers. See the Examiners' findings, paras. 70 and 81.

^{48/} Mr. Hendrickson explained (Tr. 1431-32) that in "the average first paragraph in any news, you get the complete story."

^{49/} In the Board's view, the most unfavorable aspect of his testimony was that he made use of the newspapers in the first place. How an admission that he "read[s] directly from the paper" (as the Examiners apparently construe that phrase) would have further damaged his case, is not made clear in the Initial Decision and is not otherwise apparent. Even Community's witness Horton (a WWBZ engineer, who worked at WDWL in a similar capacity during the 16 months ending in January, 1961) conceded that both Mr. Hendrickson and Mr. Morey "edited such items while on the air and did not read them verbatim." The Board has also considered Mr. Horton's further testimony (Tr. 2589) that Mr. Hendrickson "wrote nothing down from the newspapers." In light of the considerations set forth above, there are grounds for disregarding such testimony. It can, however, be accepted for either of two propositions: (a) he never saw Mr. Hendrickson copying newspaper items (in this connection, he worked at the station only 4 days per week, he never personally presented newscasts, and he had log-keeping and technical duties at the times the newscasts were being presented); or (b) during the period he worked there, it was the usual practice not to write the items out. Cf. Notes 33 and 35, supra.

^{50/} International News Service v. The Associated Press, 248 U.S. 215 (1918); KVOS, Inc. v. Associated Press, 80 F.2d 575 (1935), reversed for insufficient allegations as to jurisdictional amount, 299 U.S. 269 (1936); and Pottstown Daily News Publishing Co. v. Pottstown Broadcasting Co., 411 Pa. 383, 192 A2d 657, 25 R.R. 2131 (1963).

and concludes that the question must be answered in the negative. As the Board reads those cases, two elements must be present before unfair competition results: (a) the appropriating medium must be in

competition with the originating medium for advertisers or "subscribers"; and (b) the news involved must still be fresh, and of continued commercial value to the originator. In the instant case there appears to be no suggestion that WDVL competes, in any significant degree, with any of the newspapers (or wire services) involved, or that the station's newscasts are delivered at times other than when distribution of the newspapers is substantially complete.^{51/} It follows, therefore, that WDVL has not been engaging in unfair competition within the contemplation of the applicable authority.^{52/}

46. Aside from the matter of unfair competition, there is a further question of whether the WDVL practice has additional public interest ramifications so as to otherwise require a demerit against the station's overall record. Community has not so contended, and the Examiners appear to have resolved the question in the Hendrickson's favor. This result is consistent with the Commission's approach in WMOZ, Inc., 36 F.C.C. 202, 228, 1 R.R. 2d 801, 839 (1964), where, although noting a similar practice by the station there involved, the Commission drew no adverse conclusions therefrom. Upon consideration of the whole of the matter involving WDVL's use of newspapers in the presentation of its newscasts, the Board is in accord with the result reached by the Examiners: namely, that no demerit should be assessed against the Hendricksons from the factual situation presented.^{53/}

47. The Initial Decision reflects (Findings, para. 76) that at the time (1953-54) the Hendricksons controlled Station WHAP (Hopewell, Virginia), one advertising account was double billed. In so servicing the account, the Hendricksons continued a practice instituted by their predecessor: they instituted no new accounts of that nature at WHAP, and there is no evidence that they have ever double billed at WDVL. In view

^{51/} Nor does it appear that any of the originating media involved have complained of WDVL's practice.

^{52/} So far as appears from the evidence and the pleadings, no question of copyright infringement is involved. And see in this connection the previous note.

^{53/} The Board is not informed of the extent to which Commission licensees, for economic or other reasons, make use of newspapers in their newscasts. However, its view is that the practice, as engaged in by WDWL, is not one to be encouraged.

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of the circumstances surrounding the Hendricksons' entry into the practice, the fact that but one account was involved, and (particularly) the remoteness in time of the offense, the Board believes that no demerit should be assessed against the Hendricksons' past broadcast record. Cf. para 31, supra.

48. Based on all of the above discussion of the Hendricksons' past broadcast record, it is the Board's conclusion that, on an overall basis, such record is "within the bounds of average performance", with no demerits warranting a lesser appraisal being justified by the facts submitted in this proceeding.

D. Summation as to Best Practicable Service

49. The Hendricksons have been shown to be entitled to a substantial preference under the whole of the integration-knowledge-experience criterion, principally because of the substantial difference between the applicants in terms of proposed participation by owners in day-to-day station affairs. The applicants have been determined to be equal with respect to the program services respectively proposed. Under the past broadcast record criterion, the Hendricksons have earned only an "average" rating, while Community has been credited with a record "slightly above average." In the Board's view, the foregoing difference in ratings warrants for Community a slight preference under the criterion. Weighing that preference against the Hendricksons' substantial preference in the integration area, it is clear that the Hendricksons

emerge from the whole of the "best practicable service" comparison with at least a moderate preference. The Board does not regard this aspect of the case as close. Thus, even were Community's preference for past broadcast record greatly expanded -- by eliminating demerits assessed Community, and adding demerits to the Hendricksons' record -- the Hendricksons' substantial superiority under the integration criterion would still give the Hendricksons an overall edge, if only a narrow one.

IV. Overall Summation and Order

50. With respect to each of the "two primary objectives toward which the process of comparison [has been] directed", the Hendricksons have emerged with a preference. In the case of "best practicable service", the preference is a moderate one; and in the case of "maximum diffusion of control of the media of mass communication", the preference is a substantial one. The conclusion follows that a grant of the Hendricksons' application would serve the public interest, convenience and necessity better than would a grant of Community's.

51. The attached appendix contains the Board's rulings on the exceptions filed by the Hendricksons. Such findings of fact and conclusions of law of the Initial Decision as are not inconsistent with this decision or the rulings on exceptions are hereby adopted.

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ACCORDINGLY, IT IS ORDERED, This 15th day of December, 1965, That the application (BPH-4165) of Mortimer Hendrickson and Vivian Eliza Hendrickson, for a construction permit for a new FM broadcast station to operate on Channel 221A in Vineland, New Jersey, IS GRANTED; and that the application (BPH-3949) of Community Broadcasting Service, Inc., for the same authorization, IS DENIED.

Attachment

/s/ Donald J. Berkemeyer
Member, Review Board, Federal
Communications Commission *

Released: December 22, 1965

* See attached Concurring Statement of Board Member Joseph N. Nelson

APPENDIXRulings on the Hendricksons' Exceptions

<u>Exception No.</u>	<u>Ruling</u>
1-3	Granted in part and denied in part, as reflected in Decision, paras. 13, 23-24, and 49.
4	Denied in substance in light of the findings in the last two sentences of para. 53 of the Examiners' findings. But see Decision, para. 37.
5	Denied in substance. See Decision, Note 38.
6-7	Granted in part and denied in part, as reflected in Decision, paras. 33-34 and 38.
8	Denied for want of decisional significance.
9	Denied in substance. See Decision, paras. 36 and 41.
10	Granted in substance. See Decision, para. 42.
11	Granted in substance. See Decision, para. 47.
12	Granted in substance. See Decision paras. 43-46.
13	Granted in part and denied in part, as reflected in Decision, paras. 5 and 15-22.
14	Granted in substance. See Decision, paras. 16-18, 27-29 and 32-34.
15	Granted in part and denied in part, as reflected in Decision, paras. 30-38 and 40-49.
16	Denied in substance. See Decision, paras. 23-24.
17	Granted in part and denied in part, as reflected in the whole of the Decision.
18	Granted. See Decision, para. 50.

Concurring Statement of Board Member
Joseph N. Nelson

I concur only in the result reached in the Decision herein. The grant to the Hendricksons is warranted on the basis of the precedents and criteria which prevailed prior to the date of release of the Commission's Policy Statement on Comparative Broadcast Hearings, cited in the Decision. Although I have not found it necessary to apply the Policy Statement, in my view it supports the conclusions which I have reached.

APPLICATION FOR REVIEW OF
DECISION OF REVIEW BOARD

Comes now Community Broadcasting Service, Inc., pursuant to Rule 1.115, and requests the Commission to review and reverse the Review Board's Decision of December 22, 1965 in the above-styled comparative proceeding which reversed the Initial Decision granting Community's application.

Introduction

1. Pursuant to the requirements of Rule 1.115(b)(1), Community states that the question for review is whether the two Hearing Examiners and Counsel for the Broadcast Bureau were correct in preferring Community's application for Vineland, New Jersey, or whether the Review Board was correct in reversing the Initial Decision and preferring the Hendrickson application. The specific questions of fact and law are so numerous that they must be listed below. However, it is noted here that this case is the first to bring to the consideration of the Commission en banc several important questions concerning the applicability of the Commission's Policy Statement on Comparative Broadcast Hearings of July, 1965 (5 RR (2d) 1901).

2. Pursuant to Rule 1.115 (b) (2), Community states that the factors which warrant Commission consideration of the specific questions here presented are: (i) the action of the Review Board is in conflict with case precedent and Commission policy (including the policy enunciated in the above-cited "Policy Statement"); (ii) the action of the Review Board involves policy questions under the said Policy Statement which have not previously been resolved by the Commission; and (iii) the action of

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the Review Board contains grievous prejudicial errors of important questions of fact.

I. The Review Board Committed an Error of Fact So Gross as to Nullify Its Most Important Findings and Conclusions, Especially Its Conclusion that a Grant of the Hendrickson Application Would Promote Diversification of Control of the Media of Mass Communications.

3. Ingenuously, apparently, the Review Board observes at paragraph 7 of the Decision:

"Each of the applicants is presently the licensee of a Class III standard broadcast station in Vineland * * * and the absence of conclusions in the Initial Decision as to the diversification factor makes it obvious that the Examiners probed only to the foregoing fact in holding, in effect, that the applicants are equal in this area of comparison."

In following paragraphs, the Review Board goes on to describe (with some error) the coverage of the respective AM stations of the applicants; points out that Community's AM station operates both daytime and nighttime while the Hendricksons' AM station operates only daytime; and concludes that diversification of the media of mass communications would be significantly advanced by a grant of the Hendrickson application for the full-time FM facility and denial of the Community application, "thereby assuring competition in Vineland both daytime and nighttime." (Par. 11)

4. Not only did the two Hearing Examiners (and Commission Counsel) understand the record correctly where the Review Board failed to understand it, but even the Hendricksons did not urge in their proposed findings and conclusions or exceptions the position taken by the Review Board. The facts and their significance are as follows:

A. Community's Station WWBZ, Vineland, serves daytime to distances of about 20 miles from its transmitter, as stated by the Review Board (par. 8). (Actually, WWBZ serves somewhat less.)

B. Hendricksons' Station WDWL, Vineland, serves daytime to distances of approximately 20 miles from its transmitter, as stated by the Review Board (par. 8). (Actually, WDWL serves somewhat more.)

C. Nighttime, Community's Station WWBZ serves to distances of approximately 5 miles from the transmitter, as stated by the Review Board (par. 8). (Actually, WWBZ serves somewhat less.)

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A'. Community's WWBZ serves an area daytime of approximately 1,256 square miles. ($\text{Pi} \times r^2$)

B'. Hendricksons' WDWL serves an area daytime of approximately 1,256 square miles. ($\text{Pi} \times r^2$)

C'. Community's WWBZ serves an area nighttime of approximately 40-50 square miles. ($\text{Pi} \times r^2$, using average radius of nighttime interference-free coverage area.)

D. The proposed FM stations would provide service day and night out to approximately 40 miles, as stated by the Review Board (par. 8). (Actually, the average radius is greater.) This is an area of approximately 5,024 square miles. ($\text{Pi} \times r^2$)

5. It follows from the foregoing that both of the proposed FM stations, even when duplicating their associated AM programming, would be furnishing a new broadcast service to approximately 3,768 square miles daytime, while actually duplicating programming of their respective AM stations in an area of approximately 1,256 square miles. Most important of all, from the standpoint of the Review Board's Decision,

at night the Hendricksons would furnish new programming to an area of 5,024 square miles, while Community would furnish new programming to an area of 4,974 square miles. Thus, diversification of the media of mass communications would be advanced by a grant of the Hendricksons' application to the extent of 50 out of 5,000 square miles, or 1% of the pertinent area. Obviously, the difference with respect to diversification of media is de minimis, as recognized by everyone connected with the hearing except the Review Board. To "paint the guilded lily" a bit, it is also pointed out that the same evidence shows that Community's AM Station WWBZ does not even serve half of the business district of Vineland, New Jersey, with its interference-free contour at night.

6. All of the foregoing facts are derived from maps of record: Figure 4 of the engineering in support of the WDVL application for Vineland; Figure of the engineering in support of the Hendricksons' application herein for FM; Figures 3 and 4 of Exhibit E-3 of WWBZ's BP-12430; and Figure 6, Sheet 1 of 2, in support of Community's application herein for FM.

7. As recognized implicitly by the parties and the Hearing Examiners, the public interest would be served better by one or the other of the applicants herein -- not on the basis of promoting diversification of the media of mass communications, but on the basis of the program service which would be supplied to the FM listening audience.

II. Among the Grievous Errors Committed by the Review Board, as a Corollary of Its Basic Factual Error Concerning Coverage, Is the Error of Dissociating Community's Outstanding Past Broadcast Record from Proposed Programming.

8. For the reasons heretofore shown, approximately 75% of the FM daytime area of either Community or the Hendricksons would receive as a new broadcast service the existing ("duplicated") service

of the associated AM station. In this connection, it is noted, the Review Board has stated accurately the programming proposed by both applicants. At night, the 99% of Community's audience which would be new would receive WWBZ's duplicated programming in the fields of discussion of public issues, education, religion, agriculture, and special local events. (Community Ex. 2)

9. The Hearing Examiners observed in the Initial Decision herein (at par. 13 of "Conclusions"):

"Community produced at the hearing a most impressive aggregation of leading public officials and other prominent persons connected with civic, religious, charitable, and organizational activities in the Vineland area. Their comments at the hearing as to the cooperation given them by Community in publicizing and promoting their work through many programs constitutes a striking testimonial to the extensive 'public service' programming rendered by Community. Indeed, no facet of civic, charitable, or other public interest undertaking in the Vineland area has been overlooked by Community in making its facilities available to the entire Vineland area."

Even the Review Board stated at paragraph 35 of the Decision:

"* * * it is clear that Community is entitled to a substantial credit for a programming record beyond 'the bounds of average performance'."

10. However, the Review Board in its Decision has neglected the significance of the past broadcast record of Community, which is the same as Community's proposed duplicated programming to a large new FM audience, to invoke artificially the criteria recited in the Commission's July, 1965 Policy Statement. It is submitted that this procedure is error in that the various criteria of the Policy Statement are primarily aimed at determining probabilities of program performance

when better evidence does not exist. If proper weight were given to the past broadcast record of Community as part of the proposed programming of its proposed FM station (to a new audience not now receiving its programs), the same ecomiums would be merited for proposed programming as have been extended to past programming. Similarly, there would be little point in discussing whether "integration", "local residence", "broadcast experience", etc. augur well for future programming on a probability basis. The actual performance of the applicant would be virtually conclusive.

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III. Because the Decision Is Extraordinarily Diffuse, and Because All Errors Must Be Preserved for Judicial Review, There Follows a Summary Outline of the Decision and Specific Allegations of Error.

OUTLINE OF DECISION

Examiners gave preferences to Community on local residence, civic participation, diversification of business interests, and past programming. (Par. 3)

Examiners gave preferences to Hendricksons on integration of ownership and management, and broadcast experience. (Par. 3)

Examiners should have given only one preference for local familiarity, combining local residence, civic participation, and diversity of business interests together. (Fn. 3, Par. 5)

ALLEGATIONS OF ERROR

Error. Examiners did give preference to these criteria "collectively" as bearing on responsiveness of ownership to local needs. (I. D., par. 21, Conclusions)

Preferences on past broadcast record held in other cases to be more than offset by diversification of media considerations.

Examiners apparently ignored diversification of media of mass communications factor because both applicants have Class III AM stations in Vineland, and were considered equal with respect to this criterion. There is substantial difference. (Par. 7)

Community's five officers and directors have been such since 1946, when WWBZ was originally

Error. Cases cited are factually inapplicable: Veterans, 4 RR (2d) 411; Grand, 2 RR (2d) 346.

Error. Discussed under hearing I, above. Examiners ignored criterion because there was no appreciable factual difference.

Error, in that the change of control in February 1963 has been ignored

OUTLINE OF DECISION

authorized. Principal change has been that Lewis D. DeMarco has increased ownership from 1% to 51.5% in February, 1963.

Criticism of protest by Community against application to establish WDWL in Vineland.

ALLEGATIONS OF ERROR

in Decision, even though such change is so important as to require specific Commission consent (which was secured).

Error. Failure to mention three Commissioners not participating; one Commissioner dissenting. (Cf. citation by Review Board of dissenting opinion of one Commissioner at Fn. 14).

A grant of Community's application would give Community nighttime radio monopoly. (Par. 11)

"That Community sought to preserve its original monopoly in Vineland is, perhaps, the most salient reason for a diversification preference to the Hendricksons." "However, such a preference * * * does not, rest on the fact of WWBZ's protest * * *"
(Par. 11)

"* * * only through a grant to the Hendricksons that Vineland residents would be assured of a choice of programs during all nighttime hours." (Par. 12)

Error. As a practical matter, a grant of either application would give either recipient a monopoly. See discussion under I, above.

Error. Community acted lawfully. Further error: colorable and prejudicial statements of facts allegedly not basis of decision.

Error. See discussion under I, above.

OUTLINE OF DECISION

States hours of operation of WDVl between 8:45 a.m. and 4:45 p.m.

Fn. 14 discusses duplication and inefficiency of use of AM and FM frequencies.

Consideration of duplication in Pars. 12, 13, 14. Holding that this consideration increases Hendricksons' overall preference "to a substantial one."

ALLEGATIONS OF ERROR

Error. Failure to consider that WDVl could operate earlier and later, but does not choose to.

Error. Board does not understand facts; see discussion under I, above.

Error. Complete failure of Board to understand facts concerning duplication. (See discussion under I, above.)

Adverse comment on Community's programming proposal; counsel's statement that amendment would be filed specifying programming. (Fn. 15)

Discussion under III, "Best Practicable Service", consists of itemized consideration of criteria in Commission July, 1965 Policy Statement.

All of discussion under III (p. 9) indicates that local familiarity is of little importance unless technically "integrated." (Pars. 15-18) Implication is that outstanding past broadcast records of Community is accident or product of current employee-manager only.

Error. Ignores stipulation between parties (of record) which eliminated necessity for amendment.

Error. Discussion completely disoriented because of failure of Board to understand facts pertinent to coverage, and significance of past broadcast record as part of future programming.

Error. Policy set by Board of Directors, executed by employee-manager. New Policy Statement does not, and cannot lawfully, support Board's view.

OUTLINE OF DECISION

Hendricksons have superior integration of ownership and management. This is a primary goal of Commission's integration policies.

ALLEGATIONS OF ERROR

Error. Nothing of record to show result of integration has produced good record in past. Evidence to contrary. Integration, per se, is not lawful preference.

Preference for Mr. Hendrickson's integration. Has acted as salesman, engineer, and announcer. (Par. 19)

At Fn. 22, citation of Veterans case, 4 RR (2d) 207, to effect that 3-4 month vacation interferes with general manager's performance, as authority that vacations similarly affect members of board of directors (of Community).

Mr. Hendrickson has area familiarity because of operation of WDVL and "although he has no extensive record of civic participation in Vineland, the fact of his having carried programs and announcements on behalf of local organizations * * * is an indication that he otherwise has a knowledge of their needs."

All of paragraph 23 is based on misconception of relationship between past operation and future operation.

Error. Preoccupation of Mr. Hendrickson with details has impeded supervisory activities.

Error. Authority cited is inapposite.

Error. Not only does Mr. Hendrickson have "no extensive record", he has virtually no association with Vineland. There is nothing of record to support Board's other implications.

Error. No consideration given to service to public which would receive "duplicate" programs for first time.

11. It is necessary to interrupt the foregoing scheme of analysis in order to deal properly with paragraphs 25-32 of the Review Board's Decision. While the Review Board is entitled to credit for impersonal

concern for the public interest, the cited paragraphs strain the presumptions of protocol to the breaking point.

12. Paragraph 25 of the Review Board's Decision reduces 3-1/2 pages of detailed findings of fact in the Initial Decision reflecting the greatest possible credit on Community with respect to civic cooperation to a mere sentence which indicates by selective quotation that Community is a little bit better than the Hendricksons in responding to the public service needs of Vineland and environs. The fact is, as clearly shown on the record by the testimony of 16 witnesses who traveled to Washington at their own expense, that Community has cooperated and promoted the broadcasting of programs in the special interests of the area to a degree beyond compare with the Hendricksons. As shown in the proposed findings and conclusions herein, civic leaders in the area have been virtually unaware of the existence of the Hendricksons' AM station.

13. There is no support in the record for the Review Board's characterization of the participation of the stockholders of Community as "token participation" in view of the regular, semi-monthly meetings of the board of directors. The implication is that WWBZ's professional manager is primarily responsible for WWBZ's fine record, and that the public is attracted by the munificent daytime facilities of WWBZ (which provide substantially the same coverage as WDVL) and very little nighttime coverage.

14. Footnote 30 illustrates some point of the Board (allegedly) in showing that WWBZ carried broadcasts of the meetings of the Vineland City Council, which are held at night, while WDVL does not. There is, of course, no reason why Station WDVL could not record such meetings and broadcast them the following day. Here again, the Review Board is the victim of its own error in failing to understand the comparative facilities of the stations.

15. These distorted observations are held expressly to be in accord with the Commission's new Policy Statement of July 1965.

(Par. 26) Community does not agree; but states that, if the Review Board's contentions are correct in this respect, then the said Policy Statement is contrary to law. At paragraph 26, the Review Board seems to say that a licensee can have "credit" for fine programming only if there is integration of ownership and management. Community denies this proposition and affirms that its operation of policy formulation by a board of directors with instructions to an employee-manager is entitled to equal "credit."

16. At paragraph 27, the Review Board denigrates directors' meetings as a means of communicating policy to employee-managers. This is unfounded in fact and in law, and is the customary method of operation of corporations generally and corporate licensees in particular. In discussing Mr. Bullock, the Board refuses to consider his ill-health resulting from an automobile accident. In considering Mr. DeMarco's activities, the Board selects — not his daily contacts with the Station Manager — but only the visits he makes to the Station's premises.

17. At paragraph 29, the final unfounded insult is offered by the Board by characterizing the Community stockholders as "resident absentee owners" with only investors' concerns with the Station. Apparently, like "Topsy", Community's outstanding public service "just grew."

18. At this point, the Review Board launches into a series of paragraphs (30-32) concerning the past history of Community when it was under other control, with full knowledge that counsel for Community offered, but was refused permission, to show what the actual facts were during the periods of time covered by the Review Board's Decision. The result is that the conclusions of the Board are incorrect, based upon incomplete facts offered formerly for purposes other than those involved in this hearing, and with reckless unconcern for the accuracy of such conclusions. The crowning climax is the hypothetical

finding (?), conclusion (?), at paragraph 32 that

"were 'irregularities' now to develop with respect to WWBZ's overall operation, under Mr. Crager or some future manager, it is as likely as not that the station's ownership would be unaware of them."

19. The final touch of the Review Board's rationalization in support of its position is found in the following obvious conflict: (1) When Community is found to have been assiduous in serving the needs of the public in its locality, the credit is taken away from its controlling ownership (since 1963), and allocated fortuitously to the Station's employee-manager; but (2) when relatively slight infractions of spot announcement policy are charged (at par. 37), the licensee (the ownership) is damned — not the employee-manager.

20. At paragraphs 43-46, with associated footnotes, the Review Board's Decision twists and turns with respect to the evidence as to just how Mr. Hendrickson presented his news broadcasts. The fact is, however, that Community showed through competent evidence — as found by the Examiners — that Mr. Hendrickson could not be believed on the witness stand under oath. (I.D., Par. 19, Conclusions). This was the sole objective of Community.

WHEREFORE, Community Broadcasting Service, Inc. requests that the Commission review and reverse the Review Board's Decision herein.

Respectfully submitted,
SCHARFELD, BECHHOEFER &
BARON

By /s/ Arthur W. Scharfeld

/s/ Theodore Baron
Attorneys for Community
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1710 H Street, N.W.
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January 21, 1966

[Certificate of Service]

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[Received February 8, 1966]

OPPOSITION TO APPLICATION FOR REVIEW
OF DECISION OF REVIEW BOARD

(To the Commission)

Mortimer and Vivian Eliza Hendrickson, (Hendricksons) by their attorney, hereby oppose the Application for Review of Decision of Review Board filed by Community Broadcasting Service, Inc. (Community). In support of this opposition, Hendricksons state that the Community Application for Review fails to meet the requirements of Rule 1.115 (b) (2) in that none of the allegations in the Application for Review show, even prima facie, that (a) the action of the Review Board is in conflict with case precedent or Commission policy (including the policy enunciated in the Commission's Policy Statement on Comparative Broadcast Hearings); or (b) the action of the Review Board involves policy questions under the said Policy Statement which have not previously been resolved by the Commission; or (c) the action of the Review Board contains any prejudicial error of important questions of fact.

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I

Community fails to show any error in the Review Board's
findings and conclusions on the diversification of media issue.

1. Community contends that the Board committed a "gross error of fact" in failing to recognize that the WWBZ's nighttime service area allegedly constitutes about 1% of the service area of the proposed FM station; from this it is argued that the difference between Hendricksons, whose FM station has no nighttime service area, and Community is de minimis on the diversification issue. The contention is completely fallacious because -

(a) There is no engineering evidence in the record which can possibly support the claim that the nighttime service area of WWBZ is only 1% of the service area of the proposed FM station. The map of the WWBZ nighttime service area of which official notice was taken (T. 2108-2112, 2300-2303) shows a directional pattern. There is no evidence whatever as to the size, in square miles, of the WWBZ nighttime service area and it is ridiculous to compute the size of this area (as Community's counsel has done) by use of the formula " $\pi \times r^2$ ". Nor is there any evidence of the population within this area (see T. 2112) which could, for all the record shows, constitute 10%, 20% or perhaps 50% of the population in the proposed FM service area. Nor are there any comparative maps showing the relationship between the AM and FM coverage.

(b) Community's contention as to the small size of the WWBZ nighttime service area in comparison to the size of the proposed FM service area is immaterial. The testimony of its majority stockholder, De Marco, was to the effect that Community desired an FM station to improve nighttime listening only within the Vineland city limits.^{1/} (T. 2300-2302)

2. Regardless of how small the WWBZ nighttime service area is in comparison to that of the proposed FM station, Community does have the only nighttime broadcast medium of mass communications in Vineland, a city of considerable size (38,690), and a grant of an FM station to it would result in its ownership of the only two fulltime broadcast media of mass communications in Vineland as against the ownership by the Hendricksons of a single daytime-only broadcast medium. The Board's award of a preference to the Hendricksons on this factor is, therefore, fully justified.

3. Community ignores the significant fact, upon which the Board also relied in awarding the preference to Hendricksons on the diversification of mass media issue, i. e. that the public in the Vineland area would have a greater diversity and choice of nighttime programs by a grant to the

1/ De Marco admitted that although WWBZ has been in operation since 1946, Community did not decide to go into FM until it read about a General Motors announcement (about 1 1/2 years before May 22, 1964) that FM sets "were operational for automobiles" (T. 2302.3, 2304-5). On the other hand, Hendricksons expected to apply for FM at the time they obtained their construction permit for WDWL in 1958, upon the advice of a former Chairman of the FCC, Paul A. Walker, but were thwarted in such effectuation by the heavy expense they had been caused by the WWBZ economic protest. (T. 1914-1915).

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Hendricksons (paras. 12-14). Even though the evidence that Community would carry non-duplicated FM programming was improperly admitted, the Board credited Community with the claimed 16.5 nighttime hours a week of such programming (footnote 15, page 8 and para. 14). Comparing this to the 35 nighttime hours a week of new programming which would be provided to the public by the Hendricksons proposed FM station, it is obvious that the Board was fully justified in making the preference to the Hendricksons "a substantial one." ^{2/}

II

Community fails to show any error in the Board's alleged failure to recognize that Community's FM station would provide the alleged outstanding programs now carried on WWBZ to an audience not now reached by WWBZ.

4. This contention is predicated upon Community's fallacious contention in Point I that its FM station would provide a new nighttime program service to substantial areas not now served at night by its AM station. The factual fallacies of this predicate have been pointed out.

5. In any event, all that this contention amounts to is that Community should be given credit for proposing to bring its alleged "outstanding" programming which it has carried on WWBZ to additional people to

2/ The result reached by the Board does not penalize fulltime stations seeking FM facilities in a contest with daytime stations for the same facilities. Had Community (or any other fulltime station) been so disposed, it could minimize or perhaps even nullify any preference to the daytime station by being willing to conduct unduplicated FM nighttime operation. But as the Board points out in footnote 15, page 8, Community originally proposed no specific unduplicated programming in its application but belatedly attempted to do so (and was credited for it by the Board) by including 16 1/2 hours a week at the hearing.

be reached by its proposed AM station who are now unable to receive WWBZ. It is clear that the Board fully considered and gave full credit to Community for its past programming despite the absence of owner participation in the station's operation, as Community itself points out. But Community erroneously suggests that it should have received double credit for its past programming, i. e. first on the diversification factor and second on the "Best Practicable Service" factor. Nothing in the Policy Statement warrants giving double credit. And greater credit on the "Best Practicable Service" factor is precluded by the adverse facts found by the Board pertaining to Community's past broadcast record. Community's position, is, of course, sheer nonsense, particularly since, nowhere in its entire Application for Review, does it point out (nor can it) any inaccuracies in the Board's, and indeed the Examiners' adverse findings concerning Community's double billing and spot announcement practices, and the long history of the owners' delegation of responsibility to its manager despite past representations to the Commission to the contrary. Surely, the Board was overly magnanimous and charitable in giving Community a credit

of "slightly above average" in the face of the many adverse facts in its past performance record. In the light of the foregoing, granting the Application for Review would be a futility. For it is inconceivable that the Commission could upgrade the credit to Community - rather it is more logical to expect that a substantial demerit would be assessed against it for its continuous past record of ignoring its responsibilities as a licensee.

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III

None of the allegations of error under Community's Point III^{3/} has any substance or raise any question warranting Commission review of the decision of the Board.

(1)

6. Community claims that it was error for the Board to state (in a footnote) that the Examiners awarded preferences for each of the constituent elements of area familiarity separately. The Board did so state and added that this was not in accordance with the trend of recent Commission cases before the Commission's Policy Statement on Comparative Broadcast Hearings. Contrary to Community's contention, the Examiners did precisely what the Board said they did. This is apparent from the Initial Decision, Conclusions, paragraph 6, 7 and 8 and indeed from the very paragraph (para. 21) relied on by Community. And the giving of separate preferences for each constituent element of area familiarity was contrary to the recent decisions cited by the Board. The contention is, in any event, futile and immaterial because the Board applied the criteria in the Policy Statement. Nor does Community show or allege how it could obtain greater credit than it was given by the Board in rating "the Hendricksons combined integration-knowledge-

^{3/} Community has not numbered its assignments of error but they are dealt with herein as if numbered (1) through (19) inclusive.

experience" showings as very near 50%" as compared to "Community's zero rating" (in paragraphs 15-22 inclusive).

(2)

7. The alleged error in regard to the Board's reference (in a footnote) to past cases in which preferences on past broadcast record were more than offset by "diversification considerations" is neither error nor, even if the cases are "factually inapplicable", would the Board's reference to such cases affect any of the Board's conclusions. The cases cited do show that preferences for past broadcast records were held to be "more than offset" by diversification considerations (See Grand, 2 RR 2d 327, particularly paragraph 30 at page 346; and Veterans, 4 RR 2d 375, particularly paragraphs 80 and 81 at page 411). In any event, this contention is completely pointless and immaterial since the Board did not purport to rely on the cited cases in applying the Policy Statement and in concluding that Hendrickson deserved a preference in the integration-knowledge-experience factor, of which past broadcast record is a constituent element, even with the "slightly above average" rating given to Community for its past broadcast record. Nor does Community show or allege that the Board did not correctly apply the Policy Statement in reaching such conclusions.

(3), (6), (8), (10), (11), (19)

8. Community's various allegations of error concerning the Board's conclusions on the diversification of mass media factor have been answered under Point I above.

(4)

9. Community's allegations of error in regard to the Board's findings concerning De Marco's increase of ownership to 50% is

neither error nor does it raise any material question affecting the preferences awarded by the Board. Note that Community does not claim any error whatever in regard to the Board's findings concerning De Marco's desultory participation in station operations (paragraphs 17, 27 and 28). Therefore, if the Board had given more weight to De Marco's control, the Board's conclusions as to absence of owner participation would necessarily have been more adverse to Community.^{4/} In any event, Community fails to show how the conclusions could possibly be different if more weight had been given to such control.

(5) and (7)

10. Community contends that the Board's reference to the Commission decision criticizing Community's protest against WDWL was improper because of the fact that three Commissioners did not participate and one Commissioner dissented in the decision denying the protest. In that decision, the

^{4/} Contrary to Community's contention, De Marco's 51% ownership was expressly recognized by the Board in paragraph 28.

Commission stated that the protest was "not entirely of a frivolous or sham nature" and it referred to the "insubstantial nature of the proof offered." This is not the Board's language. It is the Commission's. Community does not suggest any reason why such non-participation and dissent affects the solemnity or official character of the decision, nor any other reason why the Board should have ignored such decision. Nor was there anything "colorable or prejudicial" in the Board's reference to the protest decision. The Board expressly stated that it did not increase the diversification preference to the Hendricksons by reason of Community's protest. Actually, the Board would have been fully justified in demeriting Community for its

protest if not on the diversification factor, most certainly in connection with its past record. Again, Community advances a futile contention - one which, by its own admission, does not affect any conclusion of the Board, and which can only logically result, on an appeal, in conclusions even more adverse to it.

(9)

11. There is no error in the Board's failure to consider that WDVH does not operate longer than 8:45 AM to 4:45 PM. At no time, has Community urged this as a matter of decisional significance (see its Proposed Findings, Reply Findings and Reply to Hendrickson's Brief in Support of Exceptions). In any event, Community fails to show or allege how this could make any conceivable difference in the preferences awarded

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by the Board.^{5/}

(12)

12. The contention concerning the Board's failure to recognize an alleged "stipulation" is simply a distortion of the facts. The stipulation referred to (T. 56) did not eliminate the necessity for an amendment. In any event, the Board gave Community complete credit for its unduplicated programming, as shown in the discussion in paragraph 3 above.

(13), (14), (15), (16), (17), (18)

13. These assignments of error are literally incomprehensible. Community does not indicate in what way the Board has misconstrued (if that is what Community is saying) the Policy Statement, or failed to "understand facts". It does not show in what way the "Policy Statement" does not, and cannot lawfully, support the Board's view." In regard to Mr. Hendrickson's integration, it is disingenuous to deny that the result of his integration has produced a good record in the past or that he carried programs and announcements for local

organizations. Voluminous findings of the Examiners and the Board, to which Community does not now, nor ever has, excepted, show such good record (See I.D. Findings paras. 59, 69, 71, and 72; Review Board Decision, paras, 39, 40, 42). The objection that Mr. Hendrickson has been "preoccupied with details" is frivolous. Findings of the Board and the Examiner to which Community has never objected

5/ The record shows enough to indicate that the Hendricksons' non-use of the fully allowable daytime hours has been the product of the financial difficulties in which Community placed the Hendricksons because of its long and expensive protest proceeding (T. 1914-1915).

show clearly that Mr. Hendrickson as an owner has been deeply immersed for many years in fulltime day-to-day operation in policy determining and management functions. Community does not show "what details" or how they have "impeded supervisory activities." Reading of the Veteran's case, 4 RR 2d 377 at page 407, ^{6/} cited by the Board as a "Cf", shows that the Board was 100% correct in its reference to this case.

14. All of Community's remaining assignments of error (paragraphs 12-20) are cumulative, vague, and inconsequential or immaterial. ^{7/} In no instance does Community attempt to point out how any of the matters it objects to could conceivably affect any of the preferences awarded, or the ultimate result reached by the Board, either under the Policy Statement or under the previous criteria.

15. In some instances, Community has suggested that if the Board correctly applied the Policy Statement, such statement is unlawful. But Community fails to show how the conclusions in the decision would be different if the precedents and policies in effect prior to adoption of the Policy Statement were applied. The Board's decision in fact shows that the preferences and result would not have been

different. Indeed, Board Member Nelson pointed out that

6/ Wrong page given by Community.

7/ In paragraph 20, Community disingenuously attacks the credibility of Mr. Hendrickson. It knows full well that the Examiners' finding as to the accuracy of Mr. Hendrickson's testimony concerning newscasts was not based on demeanor. The Examiners made this very clear. In fact they expressly referred to Mr. Hendrickson's candor as a witness and did not discredit him one iota for the alleged inaccuracy. (I.D. Conclusions, para. 19). The Board, in reversing the Examiners' finding as to the alleged inaccuracy, pointed out, by sound logic and reasoning, the error in the Examiners' finding. Community conveniently sidesteps any attempt to show that the Board's reversal of the Examiners' finding was in error. Its purpose is obviously purely prejudicial.

the same result was required under both the Policy Statement and the precedents and criteria prevailing prior to the Policy Statement.

Conclusions

16. Community has completely failed to establish even prima facie that the Review Board's decision "is in conflict with case precedent or Commission policy (including the Policy Statement on Comparative Broadcast Hearings) or that the decision contains "prejudicial errors of important fact." In no instance, has it shown how the decision is inconsistent with past precedents prior to the Policy Statement. In no instance, has it shown how the decision is in any way inconsistent with the Policy Statement. It certainly is not entitled to review upon its obtuse suggestion that review is required in order to afford it a chance to argue the lawfulness of the Policy Statement, when it has pointed out no reason why it is unlawful. Nor is it entitled to review upon this ground when it has failed to show, if the Policy Statement is unlawful, how the result would be any different under prior precedents and policy.

17. Notwithstanding the vague and obfuscatory character of the entire Application for Review, we will analyze it in broad perspective in the light most favorable to Community:

(a) Community does not contend that the Policy Statement is unlawful in regard to the diversification factor, or that the Board incorrectly gave this factor undue importance.

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It only contends that if the Board had recognized that WWBZ at night allegedly serves only a small portion of the area which would be served by its proposed FM ^{8/} station, while there would be no preference to Community, there would at least be some preference to the Hendricksons on the diversification issue. (Accepting arguendo all of Community's contentions on the diversification factor, Community does not and cannot, by any stretch of the imagination, claim any credit or preference on this factor.) Even if Community's incorrect factual assumption is accepted, the "some preference" to the Hendricksons, must inevitably be increased to at least a strong preference to the Hendricksons because they would provide through their FM station a greater number of new programs to a large number of people, namely not only those inside Vineland now reached by WWBZ at night but those outside Vineland whom WWBZ allegedly does not now reach at night.

(b) If we assume that Community is contending that the element of area familiarity should be considered disassociated from the element of owner participation in past operation, the very best that Community can achieve is equality with the Hendricksons because the record shows area residence of only 5 of its 9 stockholders, while the record shows long-time area residence (namely within the service area of the proposed FM station) and activities by 100% of the Hendricksons, and both Hendricksons have been directly associated for many years with Vineland activities and needs through their connection with WDWL.

(c) Considering the factor of program planning,

8/ The fallacies in Community's contention that this is the fact have been fully pointed out in paragraphs 1-2 above.

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the Board gave no preference to either applicant under the criteria in the Policy Statement (para. 23). However, if this factor is to be considered separately under previous criteria, there can be no doubt that the Hendricksons would merit a preference in the light of the Board's findings in footnote 18 concerning Community's belated efforts to correct deficiencies in its plans concerning programming on the proposed FM station. Moreover, there is no evidence that the owners ever approved or even saw the program proposals for Community's proposed FM station. (See Hendricksons Proposed Findings, paragraphs 15, 16, 17, 17a, Exceptions 1-3, and Brief, pages 1-4). Nothing in the Community Application for Review claims anything contrary to the foregoing.

(d) Separately considering the actual program proposals, and assuming that the proposals of neither can be found superior, (Community does not and has never contended that its proposals were superior) some preference, whether slight, modest or substantial must go to the Hendricksons for the greater amount of new or additional programs it would bring to the public vis-a-vis Community's heavily duplicated proposals.^{9/}

(e) Considering the integration factor and experience factors separately and apart from all others, Community does not, cannot, and has never contended that Hendricksons do not deserve a substantial preference

9/ It may be conceded that if the preference is given on this factor, it could not be added also to the Hendricksons preference on the diversification factor.

on each of these factors. (See Community's Proposed Findings, Reply to Hendricksons' Brief, and Application for Review).

(f) Treating past broadcast record separately, we will assume that, despite the complete absence of showing of any participation by the ownership in Community's past broadcast record, Community deserves some credit for the "goodies" (emphasized on the record by bringing to the stand a parade of Vineland citizens, including the Mayor.)^{10/} But having said this much, what else is there in Community's broadcast record which does it any credit? Certainly, not its many years of horse-racing programming, or its double billing practices, which went on for years and at the very same time Community was attempting, by its protest, to condemn and crucify the Hendricksons with the charge that a long-ago discontinued double billing account on a formerly owned station was a "form of deceit." Certainly, not its spot announcement practices and misrepresentations. Certainly not its conduct in trying to keep any competition out of Vineland with its "not entirely frivolous" and "very insubstantial" protest. And certainly not the continued apathy and indifference of the owners in regard to supervision of station operations after the owners had promised the Commission to mend their ways under threat of loss of license. Even if we can assume that with these serious blemishes

^{10/} All of which happened after Community had been soundly exoriated by the Commission and almost lost its license for carrying horse-racing programs assisting bookie activities and for unbalanced programming.

the Commission could conscientiously give Community any preference or credit for its past broadcast record (as the Board charitably did), what is the net result?

18. The net result follows:

- (a) Diversification of mass media: no preference to either or some preference to Hendricksons.
- (b) Area familiarity: no preference to either.
- (c) Program preparations: some preference to Hendricksons.
- (d) Program Proposals: if not credited to Hendricksons under diversification, some preference to Hendricksons.
- (e) Experience: substantial-to-heavy preference to Hendricksons.
- (f) Integration: substantial-to-heavy preference to Hendricksons.
- (g) Past broadcast record: no preference to either or extremely doubtful preference to Community.
- (h) Sum total: 1 doubtful preference to Community;
2 substantial-to-heavy preferences, one other definite preference, and still another possible preference to Hendricksons.

19. There is little doubt that under the foregoing analysis of the Application for Review, viewing it as favorably to Community as is possible, Commission

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review of the Board's decision must inevitably result in its affirmance. Accordingly, the Application for Review must be denied.

Respectfully submitted,

MORTIMER AND VIVIAN ELIZA
HENDRICKSON

By /s/ Benedict P. Cottone
Their Attorney

* * *

[Certificate of Service]

REPLY OF COMMUNITY BROADCASTING SERVICE, INC. TO
HENDRICKSONS "OPPOSITION TO APPLICATION FOR REVIEW OF
DECISION OF REVIEW BOARD"

Community Broadcasting Service, Inc. replies herewith to the Hendricksons' "Opposition to Application for Review of Decision of Review Board", and respectfully requests that the said Application for Review be granted.

1. Because the daytime service of Stations WWBZ (Community) and WDVL (Hendricksons) are so similar, and because the nighttime service of Station WWBZ is clearly de minimis, there was no factual basis requiring an issue in this proceeding to determine the quantitative bounds of the service of the AM stations. However, the Review Board injected this matter into the proceeding at paragraph 8 by describing radii of service for the AM and FM stations. It was error for the Review Board to do so inaccurately and meaninglessly; Community has at least presented a logical and rational evaluation of the facts. If the Commission believes that there is a reasonable factual basis for such consideration of the two proposals, then a pertinent issue should be added, and responsive evidence taken. The Hendricksons may not conveniently accept the erroneous quantitative analysis of the Review Board and reject Community's accurate analysis.

2. Community's AM station does not serve the city of Vineland at night, as pointed out in the Application for Review. Nor is it reasonably or legally sound to maintain that any quantum of service to Vineland is determinative of the diversification of control factor - under any policy, new or old.

3. The Opposition continually alleges (in footnotes) that the Hendricksons have been handicapped in operation of WDVL by the cost of litigation in the 1950s. The fact is that Community predicted in its protest that the City of Vineland would not support a second AM station, and the prediction has been proved valid by experience.

4. The Opposition falsely characterizes the testimony of Community in alleging at page 3 that "The testimony * * * was to the effect that Community desired an FM station to improve nighttime listening only within the Vineland city limits." Actually, at Tr. 2300, Mr. De Marco testified as follows:

"PRESIDING EXAMINER: Mr. De Marco, I will ask you, what reasons prompted Community Broadcasting Service, Inc., to apply for an FM station as represented in your current application?

"THE WITNESS: Mr. Examiner, there are several reasons. One reason is that we wanted to improve our nighttime listening, which is poor.

"PRESIDING EXAMINER: Poor in what respect?

"THE WITNESS: Poor quality. There are some sections in Vineland where it has a poor quality, and there are some sections where it can't be heard.

"PRESIDING EXAMINER: This is within the Vineland city limits?

"THE WITNESS: Yes * * *

5. With respect to allegedly more "new programming" of the Hendricksons at night being compared with the "new programming" of Community at night, Community repeats a main point of its

Application for Review - that all of Community's FM programming will be new programming at night by a ratio of approximately 99 to 1 in area.

6. Point II of the Opposition fails incorrectly to distinguish between the significance of good past broadcast record of Community in the factual situation here presented, and the significance of past broadcast record in the usual situation. From this error stems the Hendricksons' contention that Community seeks erroneously a double preference for its past broadcast record.

A. Community is entitled to a "credit" for good past broadcast record in the usual sense, i. e., as an indication of a probability that Community would do a good job of programming its proposed FM station.

B. However, Community is entitled to more than the usual past broadcast record "credit" in the instant case because the specific superior programming giving rise to the past broadcast record will be broadcast by the FM station.

C. More definitively, Community is entitled to a credit for past broadcast record, and credit for superior proposed programming.

7. With respect to the Opposition's contentions at page 7, Community submits that the Review Board's Decision is replete with inaccurate statements prejudicial to Community which are not purged of prejudice merely because the Decision states that they are not relied on, or are not used expressly in the Board's conclusionary process. Community is entitled to have a decision based on matters necessary to a decision without inaccurate and prejudicial coloration.

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8. Paragraph 9 of the Opposition falsely asserts that Community does not claim any error in regard to the Board's findings concerning Mr. De Marco's "desultory" participation in station operations. At paragraph 16 of the Application for Review, Community states that

"In considering Mr. De Marco's activities, the Board selects - not his daily contacts with the Station Manager - but only the visits he makes to the Station's premises." (Emphasis supplied.)

Surely it is error for the Board to select from the record only that evidence which supports a prejudicial result and to neglect favorable evidence.

9. Paragraph 10 of the Opposition is answered by paragraph 7 above.

10. In response to paragraph 11 of the Opposition, in which the failure of the Hendricksons' Station WDWL to operate beyond its present 8:45 a. m. to 4:45 p. m. hours is attributed to lack of money, it is pertinent to inquire how the Hendricksons' proposed FM station could operate unlimited time, as proposed. FM operation has not yet proved to be a profitable aspect of broadcasting. (Commission's 1964 AM-FM Broadcast Financial Data).

11. The Opposition's reference to an "alleged 'stipulation'" at paragraph 12 is a careless and misleading error. The stipulation was formally offered and received. It spelled out precisely what the parties were to submit with respect to programming. (Tr. 56)

12. The Opposition, rather than responding to paragraphs 13-20 of the Application for Review, characterizes them adversely. However, at page 7, footnote 7, the Opposition responds to Community's allegation that Mr. Hendrickson could not be believed on the witness stand as stated by the Examiners at paragraph 19 of the Initial Decision.

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A. The Examiners conclude in the Initial Decision (par. 19 of conclusions) that Mr. Hendrickson "could not be believed" with respect to certain testimony concerning the preparation and broadcasting of Station WDWL's newscasts. Community asserts that the Examiners were correct in this conclusion and the supporting findings.

B. Community asserts that the Review Board erred in reversing this conclusion of the Examiners, which it did primarily on the ground that there was no reason for not telling the truth. (Par. 44, Review Board's Decision.)

C. The Opposition alleges that the Examiners did not discredit Mr. Hendrickson "one iota for the alleged inaccuracy." The Examiners stated, rather, that the effect of Mr. Hendrickson's

not being credible on the one matter "is greatly diminished by the candor displayed by this witness in testifying generally on the use of newspapers as newscast sources." The Examiners then found no demerit against the applicant. (I.D., Conclusions, par. 19)

D. Community does not agree with the Examiner's position that one false statement is of little prejudicial effect because the witness has testified truthfully on other facts.

E. The conflict between the Examiners and the Review Board on the matter of Mr. Hendrickson's testimony was sought to be avoided by Community at the hearing by playing tape recordings of certain newscasts on Station WDVL. As Community stated in its proposed findings:

"Community attempted to play tape recordings at the hearing of news broadcasts on Station WDVL to demonstrate from the sequence of language, faltering, pauses, and other aspects of oral expression, that the news on Station WDVL was not prepared in the manner in which

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Mr. Hendrickson testified but "edited" extemporaneously and badly, but the Examiner refused permission. Community has adopted the position that no other technique of presentation of the facts can be adequate, and that, if permitted to play the said tapes, the veracity of Mr. Hendrickson would be impugned and the true character of the news broadcasts made evident."

(Page 24, par. 46)

Community is still of the opinion that the Commission's rule against playing recordings in hearing should have been waived in the instant case. While Community did the next best thing - submitting transcripts of some tape recordings (Community Ex. 23, Ex. 25) with corresponding newspaper items - Community did not waive its objection to the Examiner's ruling.

WHEREFORE, Community Broadcasting Service, Inc. requests that the Commission grant its Application for Review.

Respectfully submitted,
SCHARFELD, BECHHOEFER
& BARON

/s/ Arthur W. Scharfeld

/s/ Theodore Baron

Attorneys for Community
Broadcasting Service, Inc.

* * *

[Certificate of Service]

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[Received May 20, 1966]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Bartley concurring in the result; Commissioner Loevinger dissenting.

1. The Commission has before it for consideration in the above-captioned proceeding: (1) the Decision of the Review Board released December 22, 1965 (FCC 65R-447); (2) an application for review, filed January 21, 1966, by Community Broadcasting Service, Inc. (Community); (3) an opposition thereto, filed February 7, 1966, by Mortimer and Vivian Eliza Hendrickson (Hendricksons); and (4) a reply to the opposition, filed February 23, 1966, by Community.

2. The Review Board's decision denied Community's application and granted the competing application of the Hendricksons. After carefully examining the Review Board's decision, we do not believe that general review of it is warranted. However, we do believe that it should be amended in the following respects.

3. The Board's reference in paragraphs 10 and 11 to Community's protest against the application of Mortimer Hendrickson, Vivian Eliza Hendrickson, and John Thomas Jones, Jr., d/b as The Delsea Broadcasters (WDVL) for the establishment of a new standard broadcast

station in Vineland (Docket No. 12001, 25 F.C.C. 449, 16 RR 86 (1958)), appears to be unwarranted and should be deleted.

4. We believe that some change should be made in the Board's treatment of the program proposals of the applicants. The record supports the conclusion that Community proposes for an indeterminate period of time to duplicate on its FM station the above-average public service programs which it has carried on its AM station. While the Review Board did not consider the duplicated programming in comparing the program proposals, we believe that this programming should be considered, and

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that Community is entitled to a slight preference on this score. Only a slight preference can be accorded for such duplicated programming since the programming will already be available to the population and area of the city of Vineland now served by Community's AM station, and since it is Community's declared aim eventually to develop separate and independent FM programming for a separate FM-only audience. Community's claim that 99% of its "audience" which would receive such duplicated programming "would be new" is not supported by the record evidence.^{1/}

5. Taking into account this slight preference on proposed programming together with a similar credit accorded Community for its past record of public service programming, we believe that the preference due the Hendricksons on diversification and on their much greater degree of integration of ownership and management outweigh the preferences accorded Community. We believe that it is more important to maximize the number of voices available in the community at night and make an award to people who will actively run their station than to assign the additional facility to an applicant which is weak on those factors and whose past record shows certain undesirable practices.

ACCORDINGLY, IT IS ORDERED, This 18th day of May, 1966, that paragraph 10 and footnote 11 of the Review Board's Decision ARE DELETED;

1/ Community claims in its application for review (par. 8) that, "At night, the 99% of Community's audience which would be new would receive WWBZ's duplicated programming in the fields of discussion of public issues, education, religion, agriculture, and special local events. (Community Ex. 2)" Exhibit 2 deals with programming policy in general and does not contain any population information. Community has not indicated what population is within its FM and AM nighttime contours, and has failed to provide a factual record basis for its argument.

In addition, to the extent that Community now claims that the Review Board erred in not taking account of the greater area it would serve at night with its FM station than with its AM station in treating the factor of diversification, Community is attempting to reply upon questions of fact which it did not present to the Review Board. This it may not do. Communications Act, Section 5(d)(5), 47 U.S.C. 155(d)(5). Furthermore, so far as diversification is concerned, the contention ignores the important consideration that Community has the only nighttime radio facility in Vineland and that a grant to it would give it the only two nighttime radio stations in Vineland.

IT IS FURTHER ORDERED, That the third sentence of paragraph 11 of the Board's Decision IS DELETED and the fourth sentence of the same paragraph IS REVISED to read as follows:

It is basic "that the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public." Policy Statement, Note 4, quoting the Supreme Court in Associated Press v. United States, 326 U.S. 1, 20.

IT IS FURTHER ORDERED, That the application for review, filed January 21, 1966, by Community Broadcasting Service, Inc., IS GRANTED to the limited extent set forth above, but in all other respects IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Ben F. Waple
Secretary

Released: May 19, 1966

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PETITION FOR RECONSIDERATION

Community Broadcasting Service, Inc. respectfully requests the Commission to reconsider its "Memorandum Opinion and Order" herein released May 19, 1966, for the reasons stated below.

1. At paragraph 4 of its "Memorandum Opinion and Order", the Commission states that Community's "above-average public service programs which it has carried on its AM station" merit only a "slight preference" as proposed FM programming (partly) because "it is Community's declared aim eventually to develop separate and independent FM programming for a separate FM-only audience." This is simply an error of fact. Community Exhibit 2 makes it clear, as stated in Community's proposed findings and conclusions (at paragraph 11), that the fully matured program proposal for the FM station will continue to include the above-average public service programming exemplified in the past record of Station WWBZ. Consequently, the preference to be accorded the proposed programming of Community's proposed FM station, as proved - not by inferences, hopes, or presumptions deduced from such abstractions as "integration" but by actual past performance of the applicant - must be of the order of preponderance found and concluded by the two Hearing Examiners in the Initial Decision.

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2. In addition to the foregoing error of fact, there is an error of law inherent in the Commission's "Memorandum Opinion and Order." This case was heard prior to the Commission's publication of its Policy Statement on Comparative Broadcast Hearings of July, 1965, (5 RR(2d) 1901), and the two Hearing Examiners prepared their Initial Decision in favor of Community prior to the Policy Statement. The Opinions of both the Review Board and the Commission were prepared subsequent to the issuance of the Policy Statement. From the interpretations of both reviewing authorities, it is now clear that the Policy Statement elevated the importance of presumptions thought to arise from "integration of ownership and management" and "diversification" of broadcasting sources above other considerations of programming prediction and performance in the public interest to an extent not heretofore recognized by the Commission. In so finding and applying new policy in this particular case, both reviewing authorities recognized that they had to dispose of the problem arising from the fact that - logically - there is not much to the "diversification" argument in this instance if Station WWBZ's nighttime operation is virtually de minimis. In the case of the Review Board's Opinion, an attempt - albeit erroneous - was made to assess quantitatively the coverage of WWBZ from record evidence requested by an Examiner although not responsive to any issue (framed by the Commission) before the new Policy Statement. When Community pointed out the errors in the Review Board's computation upon application for review, the Commission disposed of the matter by stating that Community could not rely on "questions of fact which it did not present to the Review Board." This is error.

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3. Community could not know how the Review Board would interpret the Commission's Policy Statement until it wrote its Opinion,

and Community submits that the Board's interpretation finds new law not comprehended in the hearing issues. To the extent that the Review Board found the facts of coverage it did on the record evidence, then Community's deductions from the same facts are equally valid. It is submitted that it is an error of law for the Commission to find a substantial preference for the Hendricksons on the basis of WDVL being a daytime station and WWBZ being an unlimited time station without consideration of the factual meaning of WWBZ's nighttime service and coverage. Since the issues- framed by the Commission before the new Policy Statement - were not adequate to develop such facts, then the Commission may not lawfully abandon its responsibility to the public interest and to Community merely by saying there is no evidence of coverage in the record on which to base pertinent findings. Since the Commission now appears to agree with the Review Board's interpretation of the new Policy Statement, the very least the Commission can do in basic fairness to Community and in the discharge of its public service responsibility is to set aside the Decisions herein, reopen the record, and add an issue or issues with respect to the coverage of Community and Hendricksons' daytime and nighttime AM and proposed FM coverage.

WHEREFORE, Community Broadcasting Service, Inc. respectfully requests that the Commission reconsider its said "Memorandum Opinion and Order" herein, and either (1) grant the relief requested in Community's "Application for Review",

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or (2) set aside the Decisions herein, reopen the record, and add issues to determine the daytime and nighttime coverage of the

applicants' AM and proposed FM stations in relation to the "diversification" presumption.

Respectfully submitted,
SCHARFELD, BECHHOEFER
& BARON

By /s/ Arthur W. Scharfeld

By /s/ Theodore Baron

Attorneys for Community
Broadcasting Service, Inc.

* * *

June 17, 1966

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[Received July 9, 1966]

MEMORANDUM OPINION AND ORDER

By the Commission: Commissioner Johnson not participating.

1. The Commission has before it for consideration a petition for reconsideration of our Memorandum Opinion and Order (FCC 66-435, released May 19, 1966; 3 F.C.C. 2d 711) filed June 17, 1966 by Community Broadcasting Service, Inc. (Community), requesting that the Commission either: (1) grant the relief requested in Community's "Application for Review," or (2) set aside the decisions herein, reopen the record, and add issues to determine the daytime and nighttime coverage of the applicants' AM and proposed FM stations.

2. In requesting reconsideration, Community contends: (1) that the "slight preference" accorded it for its proposed duplicated FM programming is based on an error of fact insofar as it rests on Community's announced aim of developing separate and independent FM programming, since its "fully matured" program proposal for the FM station will continue to include the above-average public service

programming exemplified by the past record of its AM station; and (2) that we erred in stating that Community could not rely in its application for review on questions of fact relating to its nighttime AM and FM coverage, which it did not present to the Review Board. We have carefully examined both of these contentions, and for the reasons stated hereinafter, find them to be without merit.

3. In our Memorandum Opinion and Order we stated that since Community proposed for an indeterminate period of time to duplicate on its FM station the above-average public service programs carried on its AM station, such duplicated programming should be considered and that

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Community was entitled to a slight preference on this score. We further stated that, "Only a slight preference can be accorded for such duplicated programming since the programming will already be available to the population and area of the city of Vineland now served by Community's AM station, and since it is Community's declared aim to develop separate and independent FM programming for a separate FM-only audience." This latter reason for the slight preference was based on specific statements in Community's Exhibit 2 that, "Proposed Station WWBZ-FM will in its initial stages of operation, after technical operation has been perfected, duplicate the existing program schedule of Station WWBZ," but that, "Community aims, eventually, to develop separate and independent FM programming for a separate FM-only audience." The slight preference accorded Community for its duplicated programming is substantially supported by the record.

4. Regarding Community's contention that it should have been permitted to rely in its application for review on questions of fact which it did not present to the Review Board, we need only note here that Section 5(d)(5) of the Communications Act (47 U.S.C. 155(d)(5)) specifically provides that no application for review shall

rely on questions of fact or law on which the Board has been afforded no opportunity to pass.

5. Community also contends that, since the issues in this proceeding were framed before adoption of our new Policy Statement on Comparative Broadcast Hearings (1 F.C.C. 2d 393 (1965)), the record should be reopened and that there should be added coverage issues relating to the criterion of diversification of control of the media of mass communication. This contention is equally without merit. As stated in our Policy Statement (ibid, supra, at p. 400), we did not adopt new criteria which would call for the introduction of new evidence, but rather restricted the scope of existing factors and explained their relative importance. In our Memorandum Opinion and Order, supra, we stated that, so far as diversification is concerned, the contention concerning coverage "ignores the important consideration that Community has the only nighttime radio facility in Vineland and that a grant to it would give it the only two nighttime radio stations in Vineland." No unusual or compelling circumstances warranting reopening of the record have been shown.

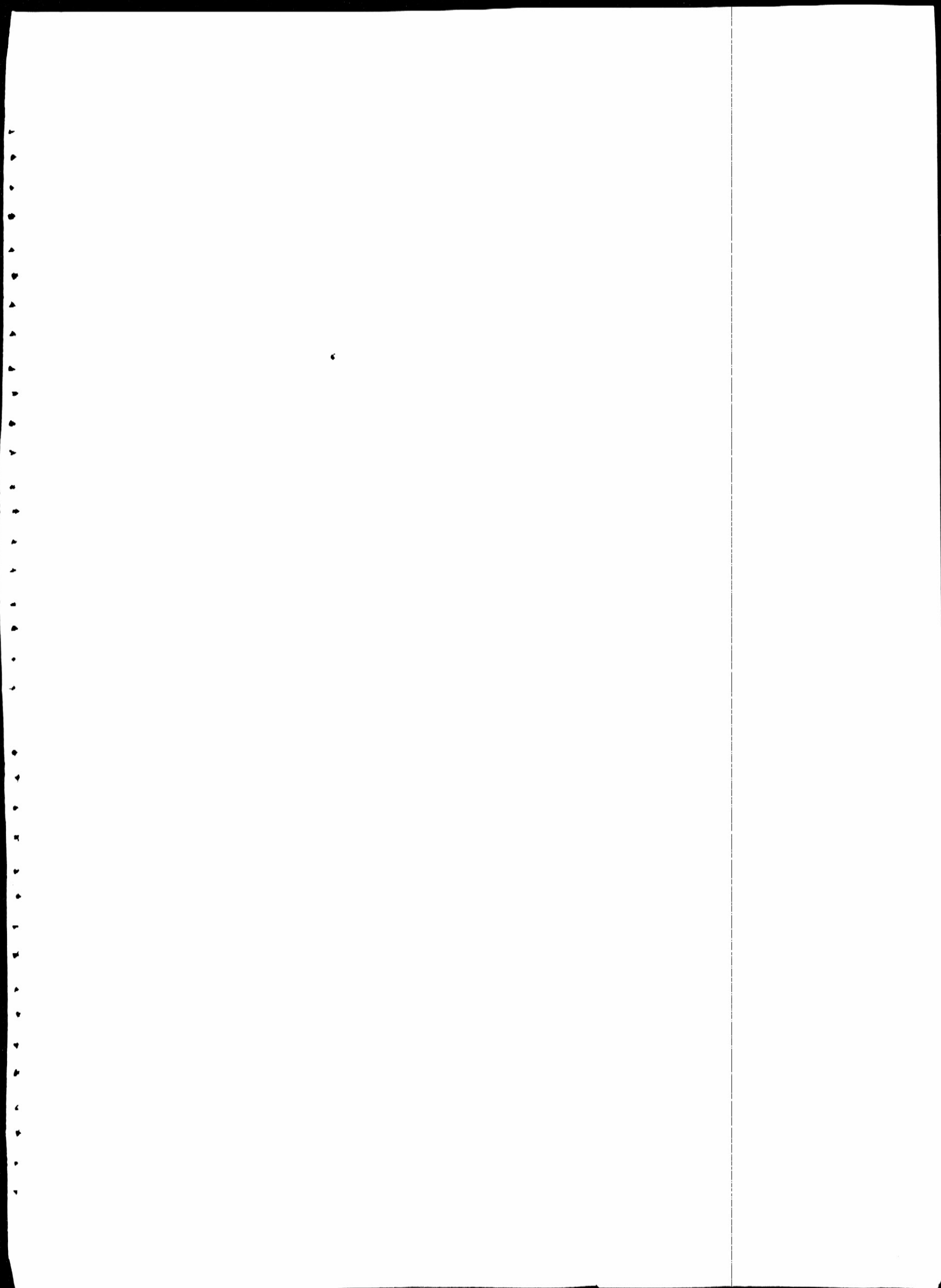
6. ACCORDINGLY, IT IS ORDERED, This 7th day of July, 1966, that the petition for reconsideration, filed June 17, 1966, by Community Broadcasting Service, Inc., IS DENIED; and

7. IT IS FURTHER ORDERED, That the proceeding in Docket Nos. 15265-66 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

/s/ Ben F. Waple
Secretary

Released: July 8, 1966



BRIEF FOR APPELLANT
COMMUNITY BROADCASTING SERVICE, INC.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,384

COMMUNITY BROADCASTING SERVICE, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee,

MORTIMER HENDRICKSON and
VIVIAN ELIZA HENDRICKSON,

Intervenors.

On Appeal From a Decision of the
Federal Communications Commission

United States Court of Appeals
for the District of Columbia Circuit

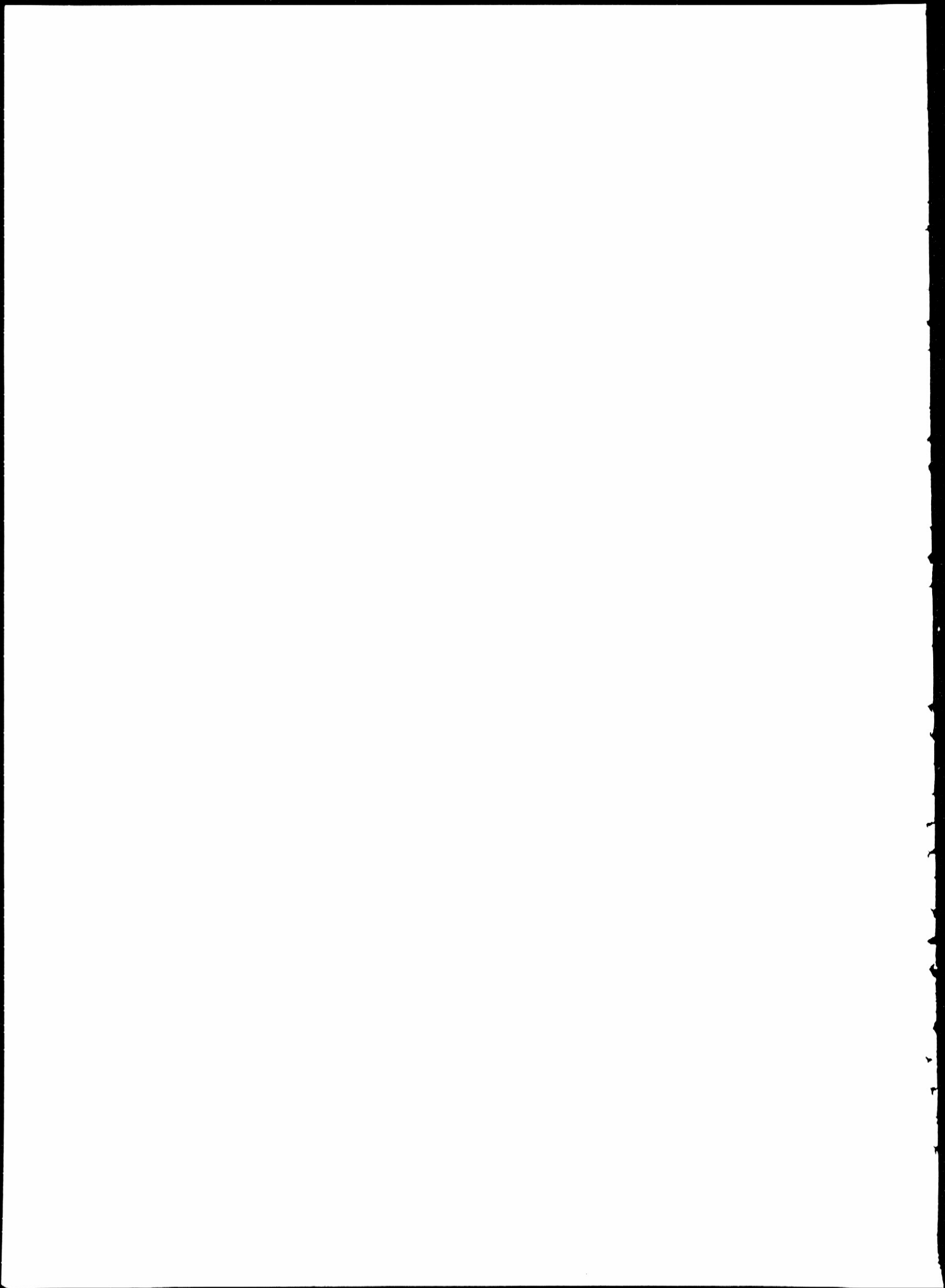
FILED OCT 26 1966

Nathan J. Paulson
CLERK

THEODORE BARON

1710 H Street, N. W.
Washington, D. C. 20006

*Attorney for
Community Broadcasting
Service, Inc.*



STATEMENT OF QUESTIONS PRESENTED

Counsel for the parties have agreed by a prehearing stipulation dated September 29, 1966 and approved by the Court on October 3, 1966 that the appellant's view of the questions presented by this appeal are as follows:

1. Whether, in deciding a comparative proceeding between two standard broadcast station licensees upon their mutually-exclusive applications for a permit to construct a new FM broadcast station in the same community, the Federal Communications Commission may lawfully consider the hours of operation of the applicant's respective standard broadcast stations, but refuse either to draw from the facts of record ultimate findings of fact and conclusions of law on the coverage of the two stations, or to reopen the record at appellant's request to take further evidence on the coverage of the stations.

2. Whether the Federal Communications Commission may lawfully weigh against the preferential "credit" accorded appellant on the record for past and proposed "above-average public service programs" the higher degree of "integration of ownership and management" of the competing applicant.

3. Whether the Federal Communications Commission may lawfully relegate appellant's "above-average public service programs" to only a "slight preference" over its competing applicant on the ground that appellant proposed to broadcast such programs on its proposed FM station for a temporary period only, when the record shows, and two Examiners and the Commission's Review Board found, that it would broadcast such programs generally.

Appellee and intervenor do not concede any factual or legal premise implicit in the issues as formulated by appellant, and believe that the issue presented is as follows:

(ii)

Did the Commission abuse its discretion when it decided that on a comparative basis a grant of intervenor's application and denial of appellant's application would better serve the public interest?

(iii)

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* Cases and other authorities chiefly relied upon are marked with an asterisk.

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,384

COMMUNITY BROADCASTING SERVICE, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

MORTIMER HENDRICKSON and
VIVIAN ELIZA HENDRICKSON,
Intervenors.

On Appeal From a Decision of the
Federal Communications Commission

BRIEF FOR APPELLANT
COMMUNITY BROADCASTING SERVICE, INC.

JURISDICTIONAL STATEMENT

This is an appeal by Community Broadcasting Service, Inc., a New Jersey corporation, pursuant to Section 402(b)(1) and (c) of the Communications Act of 1934, as amended, 47 U.S.C. 402(b)(1) and (c), and Rule 37 of the General Rules of this Court, from a Decision of the Federal Communications Commission (by its Review Board), released on December 22, 1965 (R. 348), which reversed an Initial Decision of two Hearing Examiners (R. 289) and denied appellant's application for a permit to construct a new FM broadcast station at Vineland, New Jersey, and granted the mutually-exclusive application of Mortimer Hendrickson and Vivian

Eliza Hendrickson, intervenors, and from subsequent orders of the Commission, released May 19, 1966 (R. 417) and July 8, 1966 (R. 429), respectively denying appellant's Application for Review and Petition for Reconsideration of the Decision.¹

STATEMENT OF THE CASE

Appellant, Community Broadcasting Service, Inc., and intervenors, Mortimer Hendrickson and Vivian Eliza Hendrickson, filed mutually exclusive applications for a new FM broadcast station at Vineland, New Jersey (R. 289). Each applicant was the licensee of an existing standard broadcast station at Vineland (R. 291, 301).

On January 21, 1964, the applications were designated for comparative hearing. The hearing order specified the following issues (R. 50):

- "1. To determine on a comparative basis which of the operations proposed in the above captioned applications would best serve the public interest, convenience and necessity in the light of the significant difference between the applicants as to:
 - a) The background and experience of each, bearing on its ability to own and operate the FM broadcast station as proposed.
 - b) The proposals of each with respect to the management and operation of the FM broadcast station as proposed.
 - c) The programming services proposed in each of the above captioned applications.
2. To determine in the light of the evidence adduced pursuant to the foregoing issues which of the applications should be granted." ²

The hearing was held before a Hearing Examiner of the Commission, and an Initial Decision was released on December 16, 1964, by

¹ Reference to transcript pages "Tr. " and record pages "R. " are to the record below.

² Subsequently, two issues were added with respect to the intervenors' qualifications which are irrelevant to consideration of this appeal (R. 290).

him in association with a second Hearing Examiner who did not participate in the taking of evidence (R. 289). After weighing a multiplicity of findings of fact and conclusions, the Hearing Examiners ultimately concluded that appellant's application should be granted and intervenors' application denied (R. 337). This conclusion was based on appellant's "substantially greater local identification, coupled with the superior record of past broadcast performance of Community * * * " (*Ibid.*). In turn, this ultimate result was based on the following penultimate conclusion (R. 334):

"Community produced at the hearing a most impressive aggregation of leading public officials and other prominent persons connected with civic, religious, charitable, and organizational activities in the Vineland area. Their comments at the hearing as to the cooperation given them by Community in publicizing and promoting their work through many programs constitutes a striking testimonial to the extensive 'public service' programming rendered by Community. Indeed, no facet of civic, charitable, or other public interest undertakings in the Vineland area has been overlooked by Community in making its facilities available to the entire Vineland area."

On appeal, the Commission's Review Board reversed the two Examiners' Decision (R. 348). In an "Overall Summation and Order", the Review Board concluded that the Hendricksons were to be preferred with respect to the "two primary objectives" of comparison — "best practicable service" and "maximum diffusion of control of the media of mass communications" (R. 376). The latter conclusion was derived from the finding, adverse to appellant, that appellant operated a daytime and nighttime standard broadcast station in Vineland which served at night to distances of approximately 5 miles from its transmitter and gave appellant "a nighttime radio monopoly" in Vineland, while intervenors had only a daytime station (R. 351, 353).

On "Application for Review of Decision of Review Board" (R. 378) and "Petition for Reconsideration" (R. 420), appellant alleged that

(1) the appellant's nighttime service was *de minimis*, (2) there was no issue in the proceeding permitting submission of evidence on the subject of coverage of the applicants' respective standard broadcast stations, (3) the Review Board's analysis of such evidence on coverage as there was in the record in response to a request of the Hearing Examiner outside the issues was erroneous, and (4) the record should at least be re-opened, an issue added with respect to coverage of the applicants' standard broadcast stations, and a further hearing held on such issue.

By orders of the Commission of May 19, 1966 (R. 417), and July 8, 1966 (R. 429), appellant's position was rejected and the Review Board's Decision was affirmed (with some minor changes). The same orders of the Commission also weighed against appellant's "credit" for past and proposed programming the greater integration of ownership and management of intervenors.

STATUTES AND RULES INVOLVED

The relevant portions of the Statutes and Rules involved are set forth in the Appendix to this Brief.

STATEMENT OF POINTS

1. The Commission erred in making comparative findings and conclusions with respect to diversification of the media of mass communications in a hearing in which there was no relevant issue.

2. The Commission erred in making such comparative findings and conclusions on a record lacking adequate evidence on the subject.

3. Alternatively, the Commission's Decision was factually, logically, and legally deficient for failure to draw necessary conclusions on the subject of diversification of the media of mass communications from the relevant evidence fortuitously present in the record.

4. The Commission erred in weighing against the preferential "credit" accorded appellant for past and proposed "above-average public service programs" the higher degree of "integration of ownership and managements" of intervenors.

SUMMARY OF ARGUMENT

I

In holding hearings to determine which of two mutually exclusive applications would best serve the public interest, convenience and necessity, the Commission is required to designate issues specifically (and not generally). There was no issue in the instant Commission hearing on diversification of the media of mass communications. Consequently, a decision on this ground was unlawful.

II

In order to determine which, if either, applicant would best promote diversification of the media of mass communications in a mutually exclusive situation, the Commission must know the extent to which the applicants already provide mass communications respectively to the public, and the extent to which they would provide such communication if their respective applications were granted. The extent of such communication includes, as a logical necessity, the amount of time in the case of broadcasting during which such communication exists, and the area and population to which there is communication. In the instant case, there is no evidence of record with respect to the area and population currently served by the respective applicants or which would be served by the applicants if their applications were granted. Consequently, the Commission's decision against appellant on this ground is error.

III

For an irrelevant purpose - namely, the motivation behind the respective applications - the record contains some information (of which official notice of the Commission's files was taken in support of testimony with respect to motivation) with respect to the distances from the applicants' respective standard broadcast stations' transmitters to which the applicants would serve. Such facts, in themselves, are meaningless in the absence of a showing at least of the areas served. The Commission erred in refusing to make the necessary mechanical and ministerial computations from the record evidence.

IV

Where two mutually exclusive applicants have demonstrated what their respective "integration of ownership and management" would produce by way of responsiveness to local needs through their operations of standard broadcast stations in the very same community for which applications were submitted in the FM broadcast band, it was error for the Commission to weigh against appellant's superior performance the disproved presumption that intervenors would be more responsive to local needs because of a higher degree of "integration of ownership and management."

ARGUMENT

I. THE COMMISSION ERRED IN DECIDING BETWEEN THE APPLICANTS ON THE CRITERION OF DIVERSIFICATION OF THE MEDIA OF MASS COMMUNICATIONS IN THE ABSENCE OF A HEARING ISSUE ON THIS CRITERION.

The Commission ultimately decided against appellant on the ground that the intervenors' application was superior under the criterion of promoting diversification of the media of mass communications at Vine-land, New Jersey, and because intervenors had greater integration of ownership and management (R. 417).

A. The Communications Act of 1934, as amended, and the Commission's Rules and Regulations require that hearing issues be specified by the Commission with particularity, and not be phrased generally. (Section 309 (e) of the Communications Act, Sections 1.221 (a) and 1.593 of the Commission's Rules; see Appendix hereto.) In entering its appearance, an applicant must state that it will present evidence "on the issues specified in the order." (Section 1.221 (c) of the Commission's Rules.)

B. A reading of the issues specified by the Commission for the hearing between the applicants in this case plainly shows that there is no issue on diversification of media. (See issues quoted in the Statement of Case, above.) The fact that the two Hearing Examiners' Initial Decision contained no findings of fact, no comparison between the applicants, and no conclusions of law on the subject of course supports appellant's contention (R. 289). There was simply no evidence addressed to such an issue offered or received in the hearing.

II. THE COMMISSION ERRED IN REACHING A DECISION ON
THE CRITERION OF DIVERSIFICATION OF THE MEDIA
OF MASS COMMUNICATIONS ON A RECORD WHICH
LACKS ADEQUATE EVIDENCE.

It is well established that there must be evidence adequate to support pertinent and necessary findings of fact in administrative proceedings (*Morgan v. United States*, 298 U.S. 468, 56 S. Ct. 906, 80 L.Ed. 1288.) While this principle may not hold in situations where the specific facts necessary to support a judgment are not susceptible of proof, this Court has held that a determination on diversification of media of mass communications should be based on a complete record, reflecting all available facts relating to the applicants' interests in communications. (*Clarksburg Publishing Co. v. F.C.C.*, 96 App. D.C. 211, 225 F.2d 511.) For this reason, the Commission erred in deciding in the instant case against appellant on the criterion of diversification of mass media on a record which did not even contain the basic facts as to the area and population served day and night by the appellant and intervenors' existing standard broadcast stations at Vineland, New Jersey (R. 348).

The Commission's error was compounded by its refusal of appellant's request to reopen the record to insert an issue on diversification of mass media and taken evidence thereunder (R. 421, 429).

III. IN THE ABSENCE OF AN ISSUE ON DIVERSIFICATION OF MASS MEDIA OF COMMUNICATIONS AND A RECORD ON ALL PERTINENT FACTS, THE COMMISSION ERRED IN REFUSING TO MAKE REASONABLE COMPUTATIONS FROM THE FRAGMENTARY FACTS OF RECORD.

Despite the absence of a pertinent issue on the criterion of diversification of mass media of communications, some fragmentary facts with respect to the applicants' position in the field of broadcasting in Vineland, New Jersey, were included in the record as the result of the Hearing Examiner's inquiry into the motives of the applicants in filing their FM applications (Tr. 1919 *et seq.*). The Hearing Examiner took official notice of coverage maps in the Commission's files for the support which they gave to the reasons stated by the applicants on the witness stand for the filing of their FM applications (R. 303, 319). The material recognized by the Hearing Examiner were maps showing coverage contours of the applicants' respective standard broadcast stations in Vineland (*Ibid.*). The Hearing Examiners' Initial Decision properly considered the said data solely for the purpose of describing the motives behind the respective applications (*Ibid.*).

However, the Review Board's Decision approved by the Commission used the fragmentary engineering data described above in considering diversification of control of mass media of communications (R. 351). In doing so, the Review Board did not consider areas already served by the applicants, but certain linear distances between transmitters and contours (*Ibid.*). Appellant sought, on review, to have the Commission draw more meaningful findings from the facts of record, regardless of the absence of an issue on diversification of mass media, to indicate approximately what areas were covered day and night by appellant's standard broadcast station, and the relationship of such coverage to the area which would be covered by appellant's and intervenors' proposed FM station (R. 380, 381). This the Commission erroneously refused to do in spite of appellant's contention that such appraisal of the facts showed that appellant's existing nighttime coverage was *de minimis* and did not even serve the City of Vineland (R. 417).

Thus, appellant's attempt to eliminate legal error by a threshold showing that there was no need for a diversification issue was frustrated.

IV. THE COMMISSION ERRED IN WEIGHING AGAINST APPELLANT'S SUPERIOR BROADCAST RECORD THE DISPROVED PRESUMPTION THAT INTERVENORS WOULD BE MORE RESPONSIVE TO LOCAL NEEDS BECAUSE OF GREATER INTEGRATION OF OWNERSHIP AND MANAGEMENT.

A large number of Commission decisions have established the presumption that a superior degree of integration of ownership and management in a broadcast station licensee (or applicant) will produce superior responsiveness to local public needs. (The cases are collected in Pike & Fischer, *Radio Regulation*, par. 53:24(k), M-2051 *et seq.*) In cases where an applicant with less integration than its competing applicant has demonstrated by actual broadcasting a high degree of responsiveness to local public needs, the decisions have ruled that the presumption disappears (*Lubbock County Broadcasting Co.*, 6 RR 949), that the presumption becomes of minor importance (*Petersburg Television Corp.*, 10 RR 567), and that the presumption persists, albeit weakly (*Tampa Times Co.*, 10 RR 77).

Here, the Commission weighed against appellant's admitted preferences on past broadcast record and proposed programming the presumption arising from intervenors' greater integration (R. 418). It is submitted that it is illogical and, therefore, an abuse of discretion for the Commission to persist in a presumption *which has been disproved* that the intervenors' higher degree of integration would produce superior responsiveness to public needs, and to weigh this presumption against the appellant's proved and acknowledged superiority in broadcasting in the same community.

CONCLUSION

For the foregoing reasons, appellant respectfully prays this Court to reverse and set aside the orders of the Federal Communications Commission appealed from, and remand the case to the Commission for proceedings consistent with law.

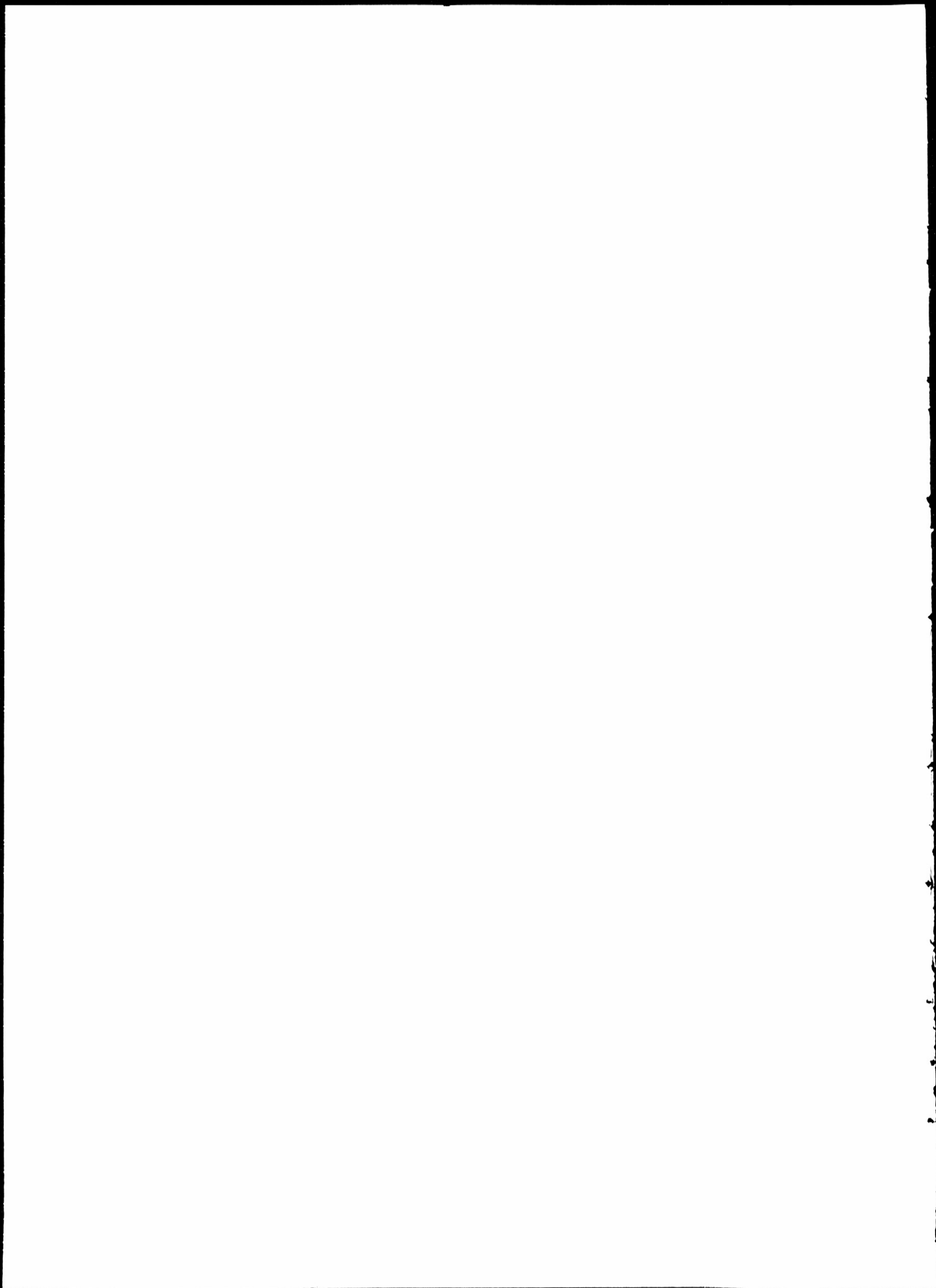
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October 24, 1966



APPENDIX

STATUTES AND RULES INVOLVED

Communications Act of 1934, as amended (47 U.S.C. 151 *et seq.*):

Section 309, Action upon Applications * * *

(a) Subject to the provisions of this section, the Commission shall determine, in the case of each application filed with it to which Section 308 applies, whether the public interest, convenience, and necessity will be served by the granting of such application, and, if the Commission, upon examination of such application and upon consideration of such other matters as the Commission may officially notice, shall find that public interest, convenience and necessity would be served by the granting thereof, it shall grant such application.

* * *

(e) If, in the case of any application to which subsection (a) of this section applies, a substantial and material question of fact is presented or the Commission for any reason is unable to make the finding specified in such subsection, it shall formally designate the application for hearing on the ground or reasons then obtaining and shall forthwith notify the applicant and all other known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally. When the Commission has so designated an application for hearing the parties in interest, if any, who are not notified by the Commission of such action may acquire the status of a party to the proceeding thereon by filing a petition for intervention showing the basis for their interest not more than thirty days after publication of the hearing issues or any substantial amendment thereto in the Federal Register. Any hearing subsequently held upon such application shall be a full hearing in which the applicant and all other parties in interest shall

be permitted to participate. The burden of proceeding with the introduction of evidence and the burden of proof shall be upon the applicant, except that with respect to any issue presented by a petition to deny or a petition to enlarge the issues, such burdens shall be as determined by the Commission.

* * *

**Federal Communications Commission Rules and Regulations
(47 CFR):**

Section 1.221, Notice of hearing; appearances.

(a) Upon designation of an application for hearing, the Commission issues an order containing the following:

(1) A statement as to the reasons for the Commission's action.

(2) A statement as to the matters of fact and law involved, and the issues upon which the application will be heard.

* * *

(c) In order to avail himself of the opportunity to be heard, the applicant, in person or by his attorney, shall, within 20 days of the mailing of the notice of designation for hearing by the Secretary, file with the Commission, in triplicate, a written appearance stating that he will appear on the date fixed for hearing and present evidence on the issues specified in the order. Where an applicant fails to file such a written appearance within the time specified, or has not filed prior to the expiration of that time a petition to dismiss without prejudice, or a petition to accept, for good cause shown, such written appearance beyond expiration of said 20 days, the application will be dismissed with prejudice for failure to prosecute.

* * *

Section 1.591, Grants without hearing * * *.

(a) In the case of any application for an instrument of authorization other than a license pursuant to a construction permit, the Commission will make the grant if it finds (on the basis of the application, the pleadings filed, or other matters which it may officially notice) that the application presents no substantial and material question of fact and meets the following requirements:

(1) There is not pending a mutually exclusive application filed in accordance with paragraph (b) of this section;

* * *

Section 1.593, Designation for hearing.

If the Commission is unable, in the case of any application for an instrument of authorization, to make the findings specified in §1.591(a), it will formally designate the application for hearing on the grounds or reasons then obtaining and will forthwith notify the applicant and all known parties in interest of such action and the grounds and reasons therefor, specifying with particularity the matters and things in issue but not including issues or requirements phrased generally.

REPLY BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,384

COMMUNITY BROADCASTING SERVICE, INC.,

Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,

Appellee.

MORTIMER HENDRICKSON and
VIVIAN ELIZA HENDRICKSON,

Intervenors.

On Appeal from a Decision of the
Federal Communications Commission

United States Court of Appeals
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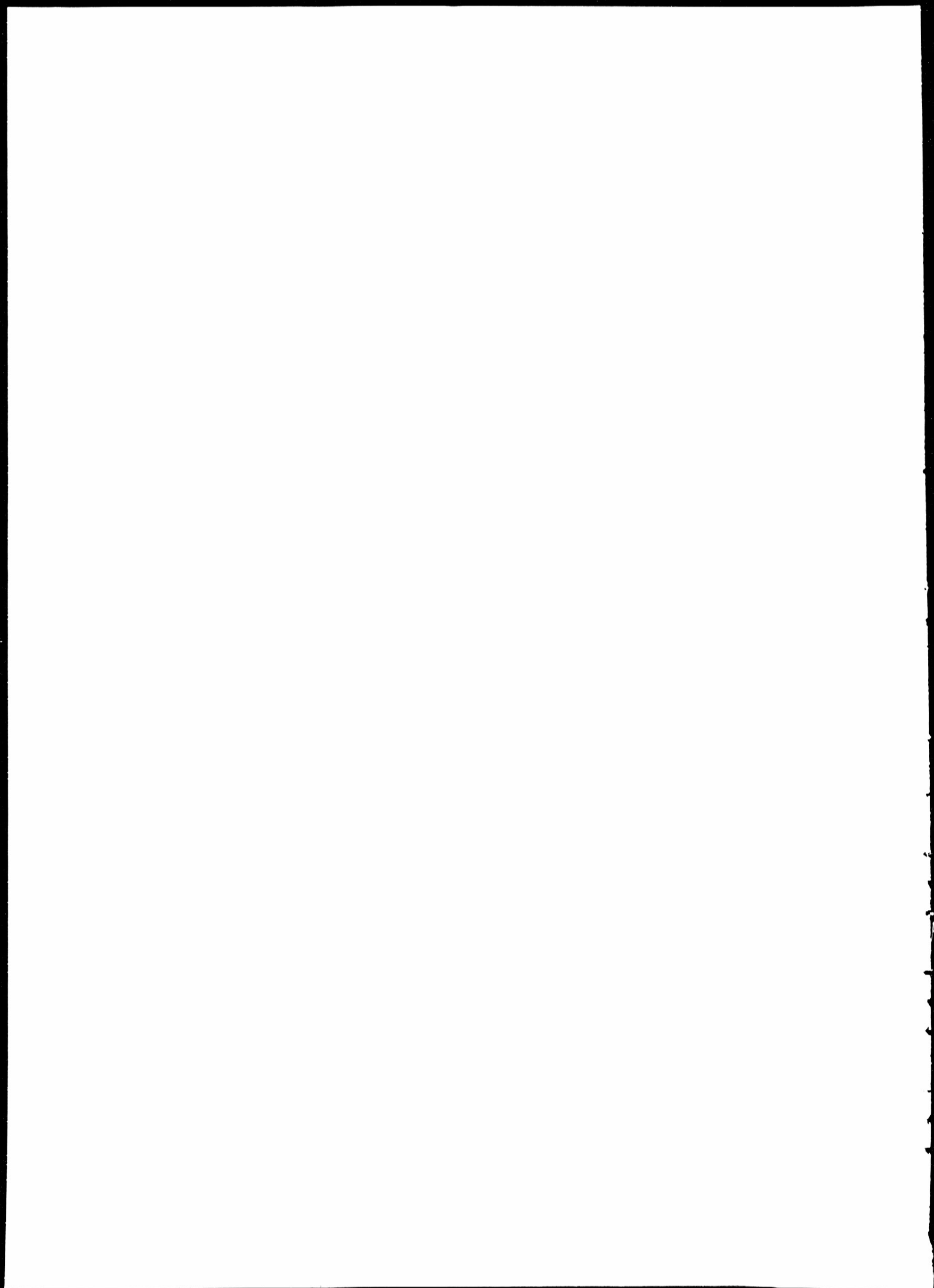
FILED DEC 15 1966

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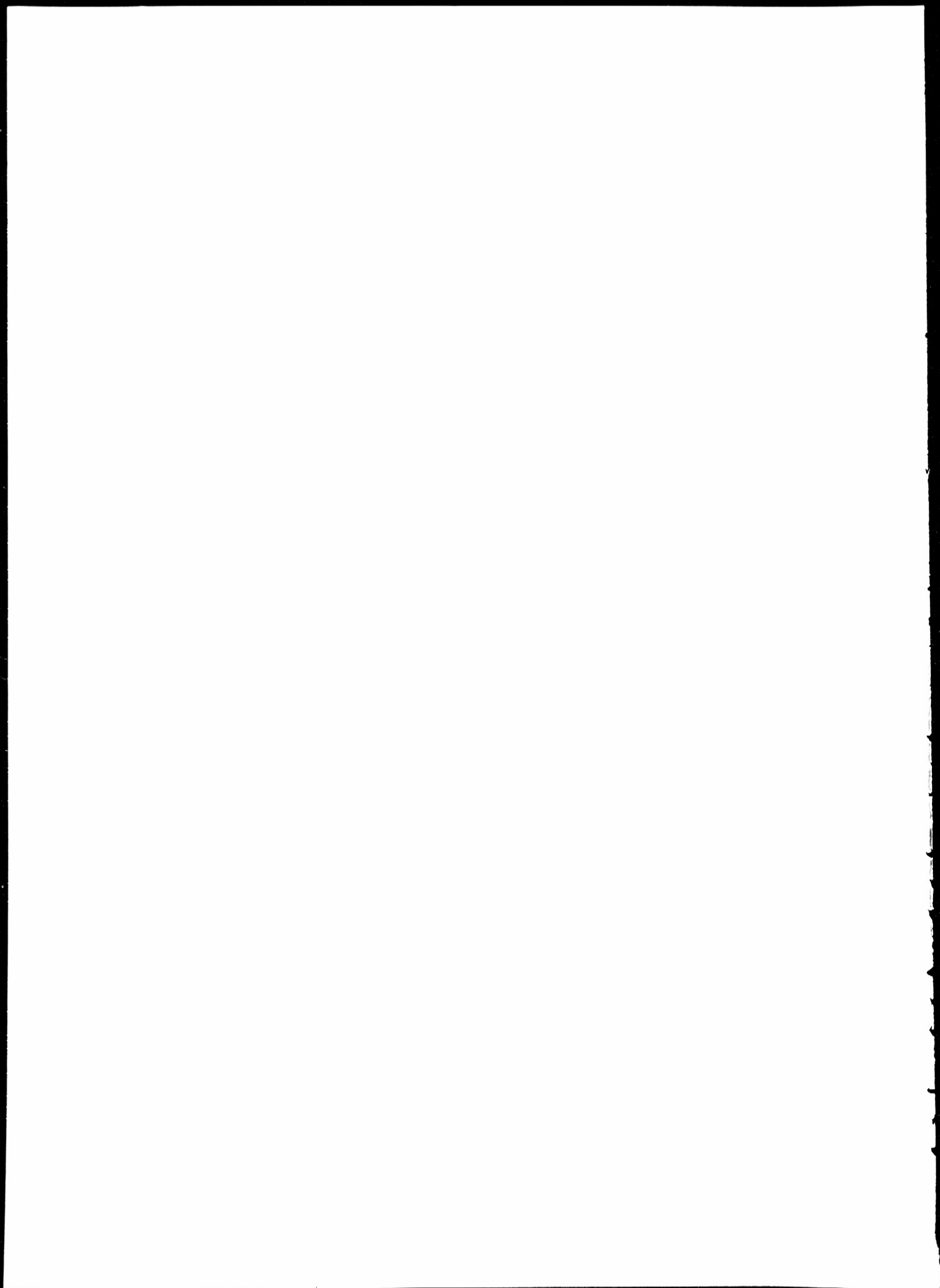
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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,384

COMMUNITY BROADCASTING SERVICE, INC.,

Appellant,

v.

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Appellee,

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Intervenors.

On Appeal from a Decision of the
Federal Communications Commission

REPLY BRIEF FOR APPELLANT

Appellant, Community Broadcasting Service, Inc., replies herewith
to the briefs of the appellee and intervenors.

I. THE GENERAL SO-CALLED "STANDARD COMPARATIVE ISSUE"
CAN INCLUDE THE COROLLARY ISSUE OF DIVERSIFICATION
OF CONTROL OF MEDIA OF MASS COMMUNICATIONS: IN THIS
CASE, THE ISSUE WAS NOT INCLUDED.

Appellee's and intervenors' argument that there was, in the instant proceeding before the Commission, an issue on diversification of control of the media of mass communications is erroneous. When, despite the requirements of Section 309 of the Communications Act of 1934, as amended, and Sections 1.221 and 1.593 of the Commission's Rules, the Commission chooses to state issues generally rather than specifically, the particular facts of the subject applications determine which specific, corollary issues are invoked. Thus, under the general comparative issue, if no applicant (or principal) has operated a broadcast station, there is no issue on past broadcast record. Thus, if there is no proposal by an applicant for a principal to engage in the daily operation of the proposed station, there is no issue with respect to integration of ownership and management. The same principle governs the inclusion of a number of issues, *e.g.*, applicants' violations of law, violations of Commission rules, and broadcast experience.

In the instant case, the difference between the standard broadcast facilities of the two FM applicants were considered unanimously by the parties and the two Hearing Examiners *not* to include the issue of diversification of control of the mass media. The matter was not expressly included in the issues (R. 50), the pre-hearing conference before the presiding Hearing Examiner did not touch on the subject (Tr. 1-43), the pre-hearing stipulation of the parties did not refer to it (Tr. 78-79), neither party offered evidence on the subject, the Hearing Examiner did not call for evidence on the subject, the proposed findings of fact and conclusions of law did not refer to the matter (R. 233-261, 262-272, 579-656), the

Initial Decision of the two Hearing Examiners did not discuss the matter (R. 289-338), and the exceptions of intervenors to the Initial Decision did not except to the lack of findings or conclusions on the subject (R. 685-700).

Since all counsel and the two Hearing Examiners did not consider the issue of diversification of control of mass media to be involved in the hearing, it is evident that the generally phrased comparative issue and the facts of the two applications did not, in fact, invoke the specific, corollary issue in this case. The decision in *McKenney v. Federal Communications Commission*, 116 U. S. App. D. C. 412, 324 F.2d 444 (1963), involving a general comparative issue, is not apposite. It is clear from that decision that the facts did invoke the specific issue of diversification of control of mass media — all the parties so understood, evidence was adduced in the hearing on the matter, and the Hearing Examiner considered the evidence.

II. THE ABSENCE OF AN ISSUE ON DIVERSIFICATION
OF CONTROL OF THE MEDIA OF MASS COMMUNI-
CATIONS RESULTED IN A RECORD ALMOST COM-
PLETELY DEVOID OF FACTS RELATED TO SUCH
AN ISSUE.

Since neither the parties nor the Hearing Examiners believed there to be a mass media issue in this proceeding, the record is virtually devoid of facts related to the subject, and such fragmentary facts as are found in the record were adduced for totally irrelevant reasons. Thus, a joint exhibit of the two applicants offered at the request of the Hearing Examiner for the purpose of generally describing Vineland, New Jersey, merely refers to the fact that there are three media of mass communications in Vineland: the standard broadcast stations of the applicants, and a daily newspaper (R. 80). The other fragmentary facts which were

borrowed by the Review Board in its decision on the subject of diversification of mass media were adduced at the instigation of the presiding Hearing Examiner for the limited purpose of determining the motivations of the applicants (Tr. 1912; *et seq.*), and were responsive to such limited purpose.

The diversification of control of the media of mass communications is, as this Court recognized emphatically in *Clarksburg Pub. Co. v. Federal Communications Commission*, 96 U.S. App.D. C. 211, 225 F.2d 511 (1955), an important component of the public interest. In that case, the Court held that the matter was so important that the Commission must, in the public interest, go beyond the allegations of private litigants before it to hold a full evidentiary hearing when the Commission has reason to believe that other pertinent evidence may be adduced. *Clarksburg* also makes it emphatically clear that the kind of hearing contemplated by this Court is a full evidentiary hearing of all facts relevant to a decision on the issue (*Id.*, at 515).

The basic defect in the Commission's decision on diversification of control of mass media in the instant case results from the absence of issue and evidence, so that there cannot be found in this record (1) the areas now served by the applicants' standard broadcast stations, daytime and nighttime; (2) the populations now served daytime and nighttime; (3) the areas and populations proposed to be served by the applicants if their applications were granted; (4) the circulation of other mass media in the area proposed to be served by the subject applicants; and (5) whatever other relevant evidence might be developed through the hearing process. When the Review Board of the Commission found it desirable to comment on specific facts of record concerning coverage of the applicants' respective standard broadcast stations, it did so in the fragmentary fashion required and permitted by a fragmentary record. Thus, the

Review Board refers to the coverage of the applicants' respective stations in terms of radii of service from transmitters, without concern, apparently, for the location of the transmitters in relation to area and population, or the significance of such facts on the question of coverage (R. 351). This was done despite appellant's testimony that its FM application was motivated partly by the failure of its standard broadcast station to serve the very City of Vineland to which it is assigned (Tr. 2300).

III. APPELLANT'S APPLICATION FOR REVIEW OF DECISION OF REVIEW BOARD WAS NOT PRO- CEDURALLY DEFECTIVE.

Appellee and intervenors rely on the theory that appellant's application for review to the full Commission was procedurally defective for failure of the appellant to file with the Review Board the substance of its application for review and petition for reconsideration addressed to the Commission. Reliance is placed on Section 5(d)(5) of the Act and the decision of *Abacoa Radio Corp. v. Federal Communications Commission*, ___ U. S. App. D. C. ___, 358 F.2d 859 (1966).

The answer to the foregoing procedural argument is that the Review Board had before it, in considering the Initial Decision of the two Hearing Examiners, all of the facts and all of the law urged by appellant in its application for review and petition for reconsideration addressed to the Commission. The real differences between the views of the Review Board and appellant are that the Review Board believes that the facts surrounding the applications invoke the diversification of media issue, and that a scintilla of evidence is sufficient for the Commission to discharge its obligation with respect to such an issue. Appellant contends that the facts did not invoke the diversification of media issue, and that a thorough investigation of all relevant facts is necessary if there is

to be a decision on such an issue. To the appellant it appears that only the full Commission was available to decide between the two views, and that further resort to the Review Board would have been fruitlessly repetitious.

The *Abacoa* case is not contrary to appellant's position. In that case, evidence was adduced at a hearing to show that an applicant for improved broadcasting facilities controlled three other stations, the applicant did not contest this evidence and did not except to a corresponding finding by the Hearing Examiner before the Review Board, only to ask the Commission to make a new finding of fact to the effect that the applicant did not control one of the three other stations (*Id.*, at 850). The cases are not analogous. The appellant here argued to the Commission a different *view* or appraisal of the record facts — not different facts.

* * * * *

The parties are at issue with respect to the meaning of a "preference" on integration of ownership and management. The appellee and intervenors regard such a "preference" as an absolute quantity, once found. Appellant regards such a "preference", once found, as a presumption which is rebutted to the extent that a competitor with less integration has amassed a superior broadcast record in the same community.

CONCLUSION

For the foregoing reasons, the Commission's decision should be reversed.

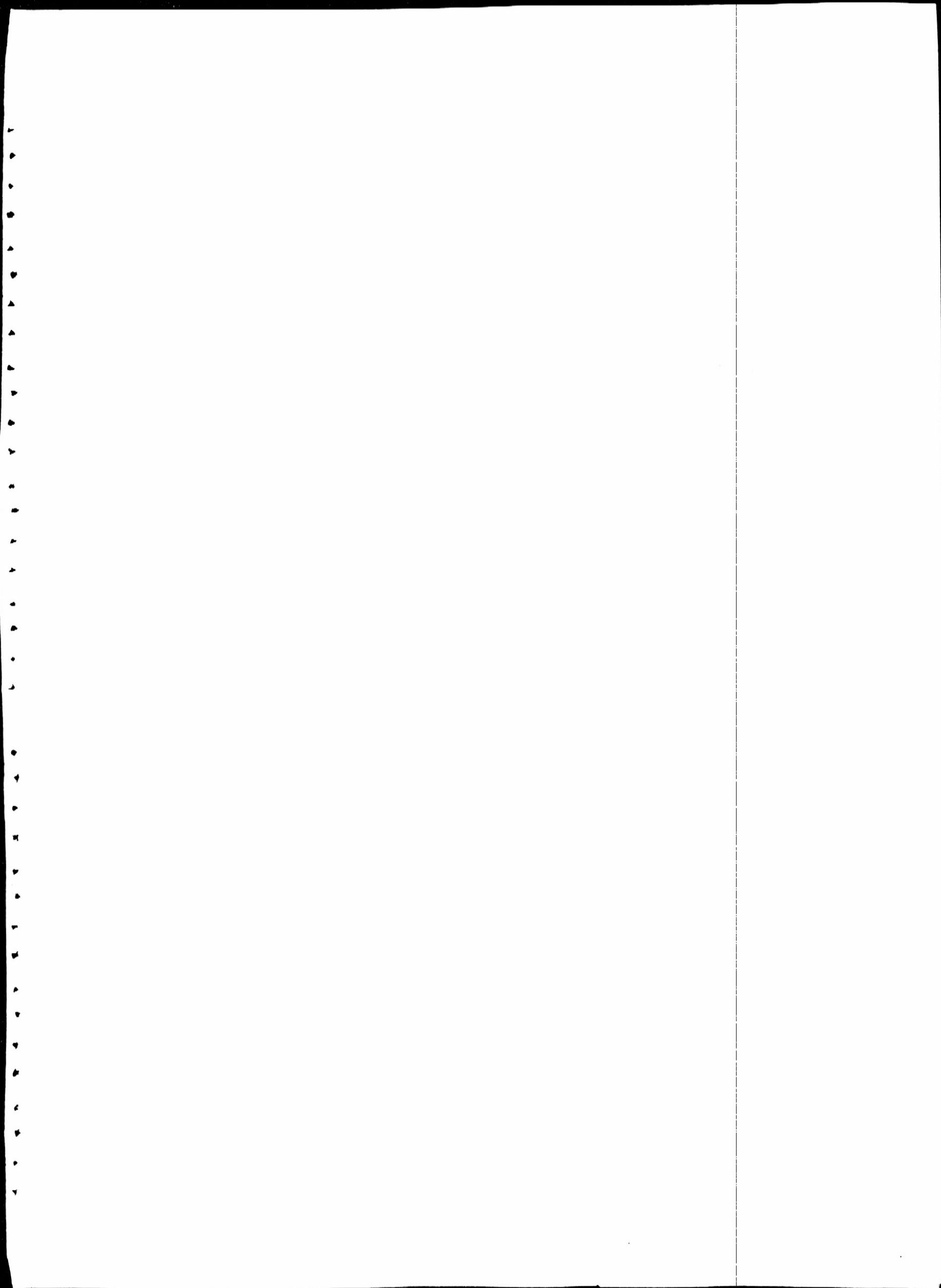
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December 6, 1966



BRIEF FOR INTERVENORS

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,384

COMMUNITY BROADCASTING SERVICE, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

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ON APPEAL FROM A DECISION OF THE
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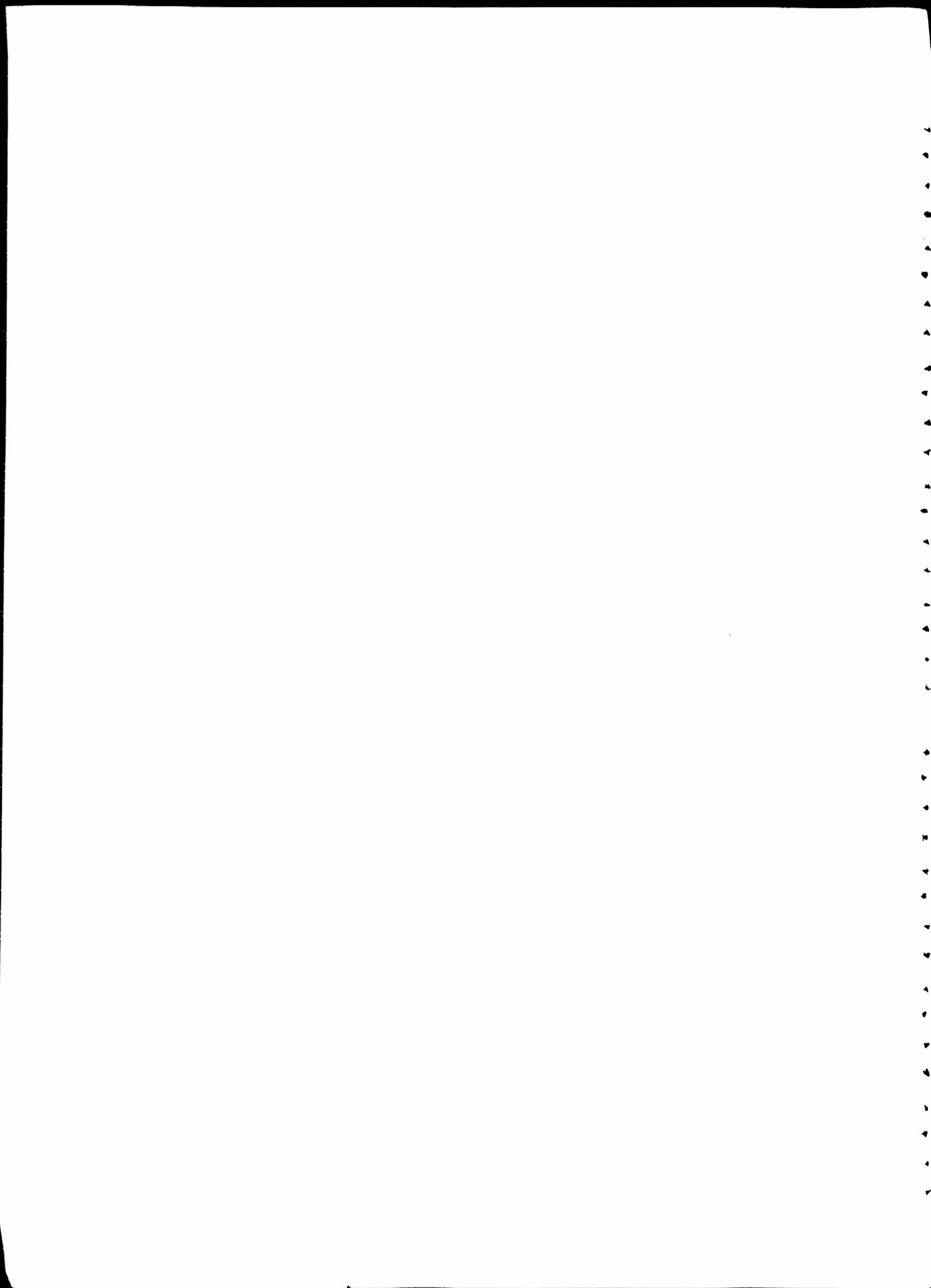
United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 21 1966

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STATEMENT OF QUESTION PRESENTED

Intervenors believe the following question is presented:

Did the Commission abuse its discretion when it decided that on a comparative basis a grant of Intervenors' application and denial of Appellant's application would better serve the public interest?

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,384

COMMUNITY BROADCASTING SERVICE, INC.,
Appellant,

v.

FEDERAL COMMUNICATIONS COMMISSION,
Appellee,

MORTIMER HENDRICKSON and
VIVIAN ELIZA HENDRICKSON,
Intervenors.

ON APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR INTERVENORS

COUNTERSTATEMENT OF THE CASE

Intervenors agree with Appellee's Counterstatement of the
Case.

SUMMARY OF ARGUMENT

Intervenors subscribe to Appellee's Argument. In addition,
Intervenors point out that Part IV of Appellant's Argument is fallaciously
and erroneously premised on an attempted inflation of the "slight"
preference given to Appellant for past and proposed programming and

ignores completely the fact that the Examiners, the Board, and the Commission found and demerited Appellant for "undesirable practices."

ARGUMENT

To avoid burdening the Court with repetitive argument, Intervenor state their agreement with the Argument of the Appellee. Additionally, however, Intervenor desires to point out further fallacies in Appellant's Argument under Part IV.

That argument is based upon an erroneous and unwarranted premise. Appellant argues, in effect, that because it received "preferences" for past broadcast record and proposed programming, the "presumption" as to Intervenor's "superior" responsiveness to local public needs, which arises from Intervenor's substantial preference on the "integration-knowledge-experience" criterion, "has been disproved." Appellant predicates this contention upon an erroneous transformation and inflation of its "slight" preferences into substantial preferences. Even if Intervenor's substantial preference on the diversification of mass media criterion could be ignored, it is clear that the Board and the Commission, for good reasons, as they plainly stated, could not find enough good in Appellant's past broadcast record or proposed programming to outweigh the presumption flowing from the substantially superior "integration-knowledge-experience" of Intervenor.^{1/} The cases

^{1/} Indeed the Board and the Commission were overly-generous to Appellant in reducing the "substantial" preference to Intervenor on this criterion to a "moderate" (but certainly still a significant) preference.

cited by Appellant are, therefore, inapplicable.

Both the Commission and the Board expressly found a continuing record of neglect, apathy, and indifference, on the part of Appellant's owners, in regard to the operations of Station WWBZ (R. 362-7). There was no convincing indication of any future change of this attitude, either with regard to the AM station or the FM station for which Appellant was applying. Such indifference and neglect had resulted--indeed, fairly recently--in "undesirable practices," for which both of the Examiners and the Board "demerited" the Appellant; and which the Commission expressly referred to in rejecting the very same argument which Appellant is now making to the Court (R. 316-7, 336, 366-7, 418).^{2/}

Appellant, in arguing that the Commission's conclusion is "illogical" is only attempting to have the Court substitute its judgment for that of the Commission by asking the Court to hold that the Commission should have granted Appellant greater preferences than the Commission, in its sound discretion, found that Appellant deserved; and by asking the Court to ignore the Examiners', the Board's, and the Commission's findings (which Appellant does not now question) concerning Appellant's "undesirable practices." The Commission fully considered,

^{2/} Here again the Examiners, the Board and the Commission were more than generous in not "demeriting" Appellant for a previous long record of "undesirable practices" in regard to aiding and abetting illegal activities (book-making on horse races) which had been discontinued only after the Commission instituted proceedings looking towards denying Appellant a renewal of its license (R. 314, 336, 364-5).

weighed, and evaluated Appellant's "slight" preferences vis-a-vis Intervenor's substantially superior "integration-knowledge-experience" and their substantial preference on diversification of mass media, and concluded that the preferences to Intervenor portended the likelihood of greater responsiveness by Intervenor to public needs. Surely there was nothing arbitrary or illogical in this judgment but, on the contrary, it would have been most arbitrary and illogical for the Commission to have concluded that Appellant's slight preferences, particularly in view of Appellant's admitted past record of undesirable practices and abdication of responsibility, indicated greater responsiveness to public needs.

CONCLUSION

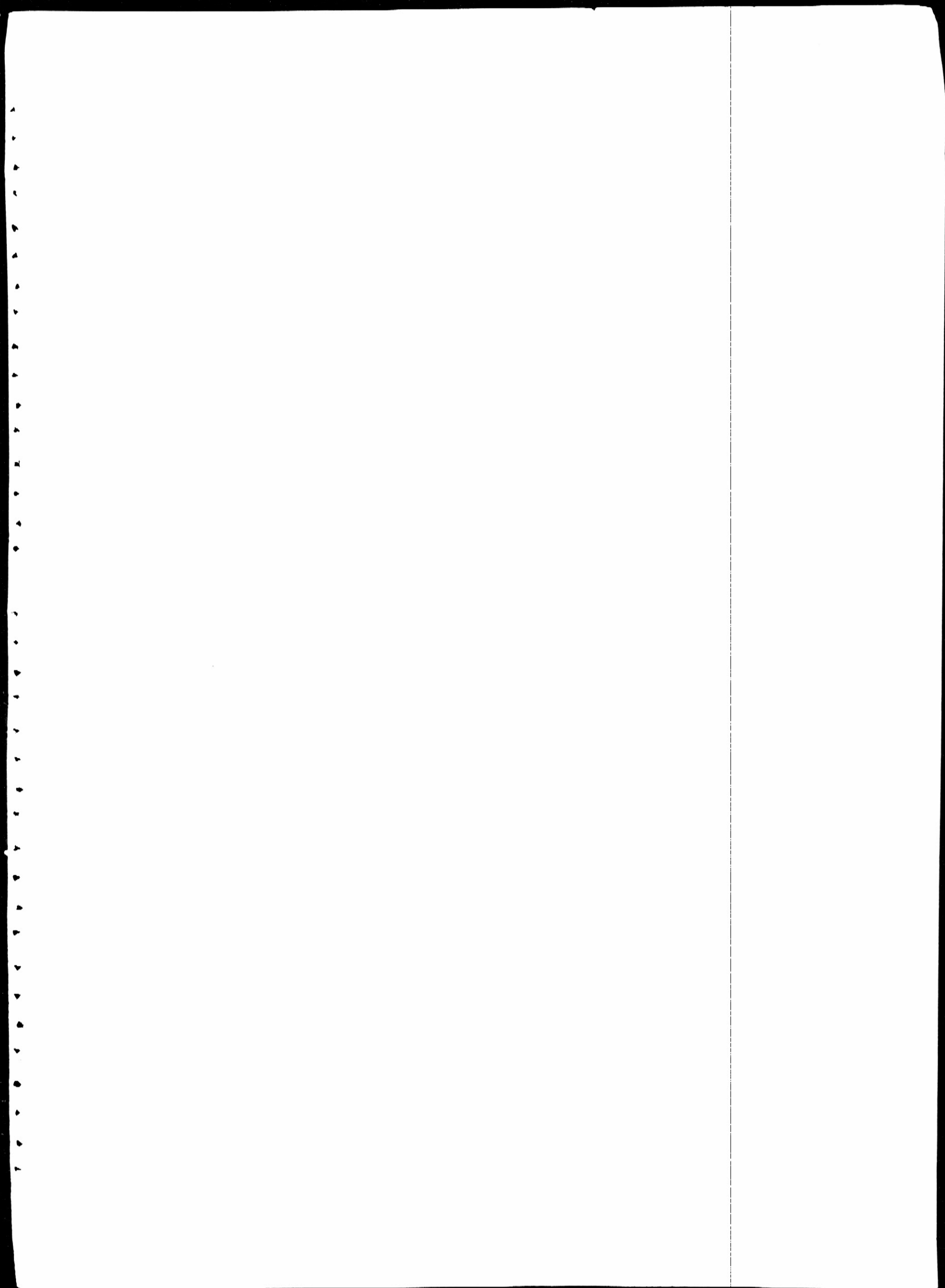
For the foregoing reasons, it is respectfully submitted that the Court should affirm the orders of the Appellee appealed from.

Respectfully submitted,

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November 18, 1966



BRIEF FOR APPELLEE

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 20,384

COMMUNITY BROADCASTING SERVICE, INC.,
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Appellee,

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ON APPEAL FROM A DECISION OF THE
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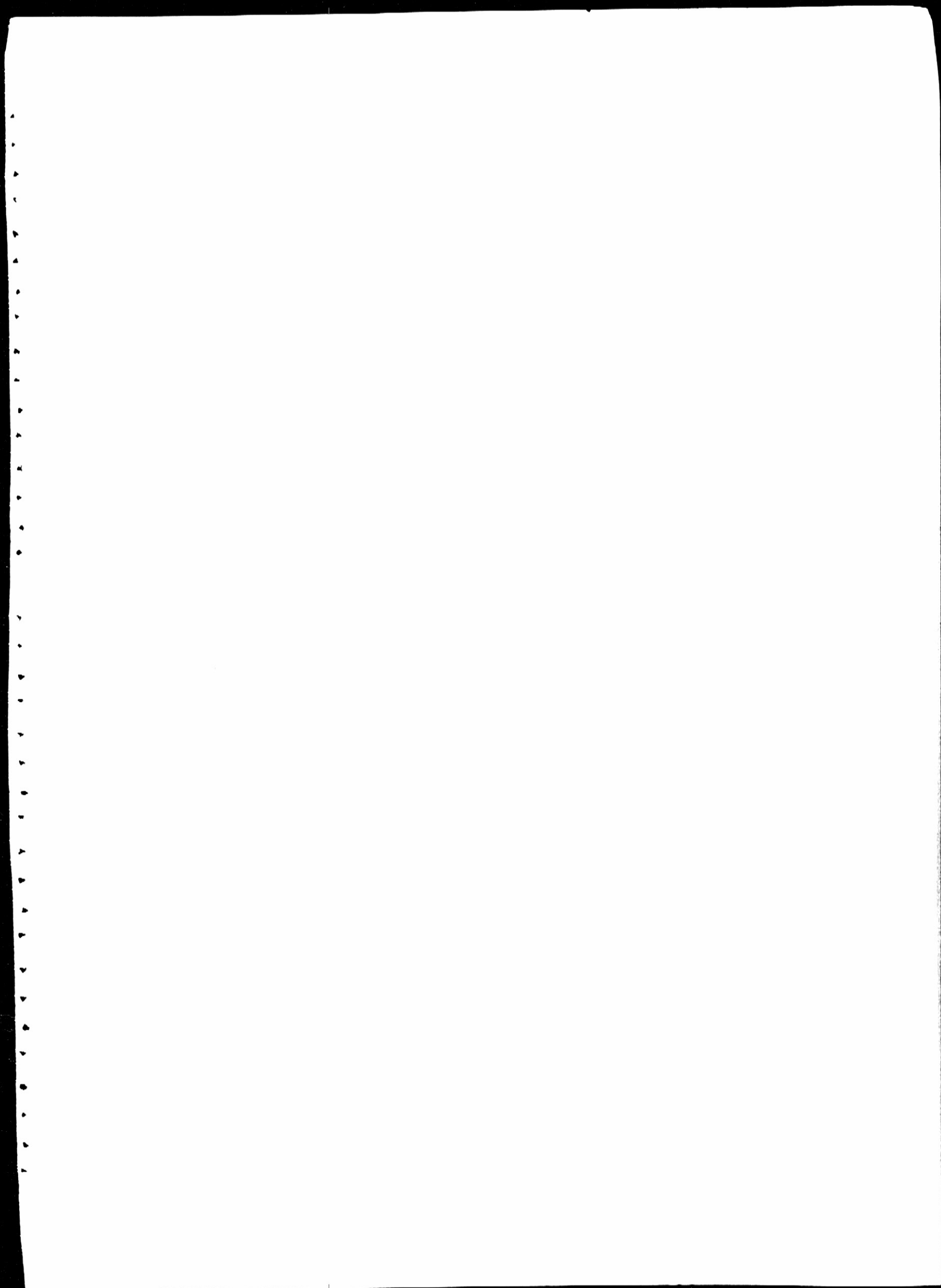
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United States Court of Appeals
for the District of Columbia Circuit

FILED NOV 30 1966

Nathan J. Paulson
CLERK



STATEMENT OF QUESTIONS PRESENTED

Appellee and intervenors do not concede any factual or legal premise implicit in the issues as formulated by appellant and set forth at page (i) of its brief, and believe that the issue presented is as follows:

Did the Commission abuse its discretion when it decided that on a comparative basis a grant of intervenors' application would better serve the public interest?

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8

Report and Order, 27 Fed. Reg. 5671 (1962).

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* Cases and other authorities chiefly relied upon are marked
with an asterisk.

IN THE UNITED STATES COURT OF APPEALS
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Appellee,

MORTIMER HENDRICKSON and
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Intervenors.

ON APPEAL FROM A DECISION OF THE
FEDERAL COMMUNICATIONS COMMISSION

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

This is an appeal filed pursuant to Section 402(b)(1) of the Communications Act, 47 U.S.C. 402(b)(1), by appellant whose application for a new FM radio station was denied by the Federal Communications Commission. The Commission concluded that on a comparative basis a grant of intervenors' application for an FM radio station in Vineland, New Jersey, would better serve the public interest than would a grant of appellant's application for the same facilities (R. 348-377, 417-419, 429-430). We believe that a more detailed statement of the case than has been submitted by appellant may be of assistance to the Court.

Appellant, Community Broadcasting Service, Inc., is presently the licensee of a standard broadcast station in Vineland, New Jersey. Its station operates both during the day and at night. Intervenors, Mortimer and Vivian Eliza Hendrickson, are also the licensees of a standard broadcast station in Vineland. Their station, however, may only be operated during the day.

Both appellant and intervenors filed applications with the Commission proposing to operate an FM station on the only channel assigned to Vineland. The proposed FM station would be operated daytime and nighttime. Since the two applications for the same FM channel were mutually exclusive, they were designated for hearing on a standard comparative issue (R. 50-51).

Following nineteen days of hearing, an initial decision was released on December 16, 1964, which proposed to grant Community's application (R. 298-338). Preferences were awarded to intervenors, the Hendricksons, for integration of ownership with management and for persons' experience on all aspects of broadcast operations. These preferences were found to be overbalanced by those awarded to appellant Community for area familiarity and for above average past public service programming. A comparative demerit was assessed against Community for being "more blameworthy" with respect to the

"reprehensible" fraudulent advertising practice of double billing.^{1/}
This demerit, however, was not found to be sufficient to prevent a grant of Community's application.

Exceptions were filed with the Commission's Review Board by intervenors (R. 685-721). No exceptions were filed by appellant but in a responsive pleading it supported the initial decision (R. 722-727). After oral argument (Tr. 2662-2717), the Board adopted a decision reversing the initial decision (R. 348-377).

In its decision, the Board concluded that the initial decision was "most significantly in error" in overlooking the fact that a grant of appellant Community's application would concentrate in its hands the only two nighttime radio stations in Vineland. Considering this fact under the comparative criterion of diversification of control of mass media of communications (R. 341-353), it concluded that:

An award here to [appellant] Community would concentrate in that licensee the two most powerful and the only two unlimited stations in Vineland, and leave a daytime only station as their sole radio competition. On the other hand, a grant to the Hendricksons [intervenors] would place the two full time facilities with different licensees, thereby assuring competition in Vineland both daytime and nighttime (R. 353).

A significant preference was therefore awarded to intervenors on

^{1/} In a "double billing" situation, a broadcaster submits "to a local advertiser two bills, one in the amount agreed upon for advertising material broadcast, the other in a larger amount to be submitted by the local advertiser to a manufacturer or national advertiser to support a claim for reimbursement pursuant to a cooperative advertising agreement. The issuance of the second false bill is part of a scheme to defraud the manufacturer or national advertiser." See Double Billing Practices, 23 Pike & Fischer, R.R. 175, released March 9, 1962.

the diversification criterion.

Other aspects of the competing proposals were considered under the heading "best practicable service" (R. 356-374). At least a moderate preference was awarded to intervenors principally because one of the owners proposed to participate in the day to day operation of the station's affairs. On the other hand, the Board found that "the delegation of responsibility and authority" by appellant's owners "with respect to all significant station affairs is almost total." And over the years this was reflected in serious misconduct including the fraudulent double-billing for which appellant had been faulted by the examiners (R. 362-369). As a result of the weighing of the various comparative factors, the Board concluded that a grant of intervenors' application would better serve the public interest.

The Commission was asked by appellant to review the Board's decision. It agreed that Community was entitled to some additional credit for its program proposals because of its past public service programming. This preference was deemed to be slight, however, since the programs were already available on appellant's existing AM station, and would be discontinued in the future when appellant developed separate programming for its proposed FM station. The Commission found that on balance this change did not affect the Board's ultimate conclusion because :

" . . . the preference due the Hendricksons on diversification and on their much greater degree of integration of ownership and management outweigh the preferences accorded Community. We believe that it is more important to maximize the number of voices available in the community at night and make an award to people who will actively run their station than to assign the additional facility to an applicant which is weak on those factors and whose past record shows certain undesirable practices" (R. 419). (Emphasis added.)

This appeal followed the Commission's denial of appellant's petition for reconsideration (R. 429-430).

SUMMARY OF ARGUMENT

After a lengthy comparative hearing, the Commission concluded that a grant of intervenors' application would best serve the public interest. Appellant asserts that the Commission erred in awarding intervenors a preference on the criterion of diversification of control of mass media of communications. This Court has held that ". . . the Commission is free to let diversification of control of communications facilities turn the balance, if it reasonably concludes that it is proper to do so." McClatchy Broadcasting Co. v. Federal Communications Commission, 99 U.S. App. D.C. 195, 239 F.2d 15, cert. denied sub nom. Sacramento Telecasters, Inc. v. McClatchy Broadcasting Co., 353 U.S. 918 (1957). Here, before reaching its decision, the Commission considered all the comparative differences between the two proposals, and appellant has not shown that the Commission's judgment was unreasonable.

ARGUMENT

- I. THE COMMISSION'S CONCLUSION THAT A GRANT OF INTERVENORS' APPLICATION WOULD BEST SERVE THE PUBLIC OF VINELAND, NEW JERSEY, WAS BASED UPON AN EVALUATION OF ALL THE COMPARATIVE CRITERIA; IT WAS PROPER FOR THE COMMISSION TO AFFORD INTERVENORS A PREFERENCE ON THE TRADITIONAL CRITERION OF DIVERSIFICATION OF CONTROL OF MEDIA OF MASS COMMUNICATION.

In this comparative case, the Commission and its Review Board held that the public would best be served by a grant of intervenors' application to establish a new FM station in Vineland, New Jersey. This conclusion followed nearly three weeks of hearing, a detailed initial decision, comprehensive review by the Review Board, and limited review by the full Commission. Findings were made on all comparative aspects of the competing proposals, and the winning applicant was preferred chiefly because of the policy favoring diversification of control of mass media of communications, and because one of the owners would "actively run the station."

On appeal to this Court, most of appellant's argument is directed against the preference awarded on the diversification criterion.^{2/} It contends there was no specific issue on this

^{2/} In its notice of appeal, pp. 3-4, appellant asserted that the Commission's decision was in error because it was based on "new criteria for decision published by the Commission without rule making proceedings as 'Policy Statement on Comparative Broadcast Hearings' in July of 1965" This point has not been briefed by appellant, and accordingly has been abandoned. Idaho Microwave, Inc. v. Federal Communications Commission, 122 U.S. App. D.C. 253, 352 F.2d 729 (1965). In any event, the agency noted in its decision that the older comparative policies "would dictate the same result" (R. 349, 430).

criterion, that the preference is not supported by adequate record evidence, and that the differences on the diversification aspects are de minimis. We will show that the agency exercised sound judgment and discretion in reaching its conclusion in this case. We will also show that appellant never gave the Review Board an opportunity to pass on its contentions as required by Section 5(d) (5) of the Communications Act, 47 U.S.C. 155(d) (5).

A. Traditionally, Diversification Of Control Of Mass Media Of Communications Has Been Considered In Comparative Cases.

Because appellant and intervenors filed mutually exclusive applications requesting the same FM channel in Vineland, their applications were designated for hearing. In its hearing order, the Commission specified a standard comparative issue designed to ascertain which applicant would better serve the public interest (R. 50-51). Appellant contends that this comparative issue did not specifically place in issue diversification of mass media (Br. 7).

Section 5(d) (5) of the Act governs review before the Commission. It provides that an application for review filed with the Commission shall not rely on a question of fact or law upon which the Review Board has not been afforded an opportunity to pass. See also 47 CFR 1.115(c).^{3/} Here, the record reveals that

^{3/} Congress specifically amended the Communications Act in 1961 so that the Commission could create this Review Board. The congressional purpose was to relieve the Commission of the burden
(cont'd)

appellant's contention was not advanced before the Review Board. In fact, in an application seeking review of the Board's decision filed with the Commission, appellant did not contend that the diversification criterion was outside the scope of the comparative issue. It asserted instead that the Board had erred in failing to conclude that "the difference with respect to diversification of media is de minimis" (R. 381) and that the examiners had correctly concluded that "there was no appreciable factual difference" on this criterion (R. 384).

In Abacoa Radio Corporation v. Federal Communications Commission, __ U.S. App. D.C. __, 358 F.2d 849, 850 (1966), this Court was presented with a case in which an applicant had failed to comply with the Commission's rules governing review. It held that "The policy expressed in these rules, with which appellant failed to conform, leads us to affirm especially in the absence of a clear showing of a well-founded contention that the Commission's decision . . . was erroneous."

Here appellant has also failed to advance "a well-founded contention." Numerous decisions by this Court, the

3 / (cont'd) imposed by a great number of adjudicatory proceedings raising routine legal and factual matters -- thereby permitting the Commission to concentrate on important policy matters. See Public Law 87-192, approved August 31, 1961, 75 Stat. 400, 47 U.S.C. 155(d); House Report No. 723, 87th Cong., 1st Sess., p. 1; S. Report No. 576, 87th Cong., 1st Sess., p. 5; and Report and Order, 27 Fed. Reg. 5671 (1962), in which the Commission established the Review Board.

Commission, and its Review Board placed appellant on notice that diversification of control of mass media of communications is a legitimate public interest consideration in a comparative case. See e.g., Sunbeam Television Corporation v. Federal Communications Commission, 100 U.S. App. D.C. 82, 84, 243 F.2d 26, 28 (1957); McClatchy Broadcasting Co. v. Federal Communications Commission, supra; Scripps-Howard Radio v. Federal Communications Commission, 89 U.S. App. D.C. 13, 189 F.2d 677, cert. denied 342 U.S. 830 (1951). And in Lloyd Clinton McKenney v. Federal Communications Commission, 116 U.S. App. D.C. 412, 324 F.2d 444 (1963), involving a comparative issue identical to that designated for hearing in this proceeding, the Court affirmed the Commission's decision which awarded the winning applicant a substantial preference in the area of diversification of ownership of broadcast stations. It is clear here that evidence regarding diversification could have been introduced under that portion of the comparative issue concerning the "background and experience" of each applicant (R. 50).

Decisions at the administrative level also clearly indicate that diversification of mass media is a factor to be considered in comparative cases. Thus, for example, on March 7, 1963, the Commission's Review Board discussed the standard comparative issue in Windber Community Broadcasting System, 34 F.C.C. 571, and pointed out that the diversification factor

had been decisive on many occasions in the past, citing Courtney Broadcasting Co., 34 F.C.C. 185 (1963); Florida Gulfcoast Broadcasters, Inc., 32 F.C.C. 197 (1962); Greater Princeton Broadcasting Co., 32 F.C.C. 389 (1962); Midwestern Broadcasting Co., 25 F.C.C. 369 (1958); and the Toledo Blade Co., 25 F.C.C. 251 (1958).

All of these decisions were adopted prior to the designation of appellant's application for hearing on January 21, 1964. Thus, there can be little doubt that appellant had notice that diversification was a public interest factor which would be considered under the standard comparative issue. And all doubt is dispelled when it is recalled that in its application seeking review of the Board's decision, appellant argued not that diversification was outside the scope of the issues but that the Board should have concluded that the difference on this criterion was de minimis.

B. The Commission Correctly Concluded That Intervenor's Were Entitled To a Preference On The Diversification Criterion.

Both the Board and the Commission awarded intervenors a comparative preference on the diversification criterion. Appellant maintains that this preference was not supported by adequate record evidence (Br. 8). Moreover, it asserts that the Commission should have concluded on the basis of the limited available evidence that the differences on the diversification criterion were de minimis (Br. 9).

The record reveals that these factual matters were not raised before the Board even though appellant might have asked the Board to reconsider its decision, 47 CFR 1.106. In rejecting these arguments, the Commission held that appellant had failed to comply with Section 5(d)(5) of the Act. For the reasons stated in part A of our argument, this conclusion should be affirmed. Abacoa Radio Corp. v. Federal Communications Commission, supra.

In addition, the Commission is also clearly correct on the merits. The thrust of appellant's contention is that the coverage of its present radio station at night is extremely limited and that because of this fact the Commission should have concluded that the differences under the diversification criterion were de minimis.

On this point, the Commission indicated that it could not agree with appellant's contention because it "ignores the important consideration that Community has the only nighttime radio facility in Vineland and that a grant to it would give it the only two nighttime radio stations in Vineland" (R. 418, 430). Thus, the Commission did consider appellant's argument but concluded that the differences on diversification were not de minimis. "[T]he Commission is free to let diversification of control of communications facilities turn the balance, if it reasonably concludes that it is proper to do so." McClatchy Broadcasting Co. v. Federal Communications Commission, 99 U.S. App. D.C. 195, 239

F.2d 15, cert. denied sub nom. Sacramento Telecasters, Inc. v. McClatchy Broadcasting Co., 353 U.S. 918 (1957). In the context of this case, appellant has failed to show that the Commission's judgment on this question was unreasonable.

C. The Commission Correctly Concluded That Intervenor's Were Entitled To a Preference For Integration Of Ownership With Management Since One Of The Owners Would Actively Run The Station.

At all levels of the administrative agency, intervenors were preferred under the integration criterion. Appellant's final argument is that this preference should not have been awarded since it was rebutted by appellant's own record of outstanding public service programs (Br. 10).

This argument overlooks the fact that intervenors were first awarded a preference on the integration criterion in the initial decision. No exceptions were taken to that award, and thus the point has been waived, 47 CFR 1.227(a), Cf. Abacoa Radio Corporation v. Federal Communications Commission, supra.

Perhaps more important is the fact that both the Commission and the Review Board found that appellant's owners have virtually abdicated control over all significant aspects of their existing stations's operation. And this has contributed to certain undesirable practices including the fraudulent double billing for which appellant received a demerit. In addition, a substantial demerit was assessed against appellant "for the owner's failure to honor its [past] commitments to be more attentive to station affairs" (R. 369).

The orders appealed from in this case reveal that the agency after considering all the comparative factors favoring a grant of each proposal concluded that a grant of intervenors' application would best serve the public of Vineland, New Jersey. Making such a choice "is basically a matter of judgment, often difficult and delicate, entrusted by Congress to the administrative agency." Pinellas Broadcasting Co. v. Federal Communications Commission, 97 U.S. App. D.C. 236, 238, 230 F.2d 204, 206, cert. denied 350 U.S. 1007 (1956). We submit that sound judgment has been exercised by the Commission in this case.

CONCLUSION

In view of the above, the Commission's decision should be affirmed.

Respectfully submitted,

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November 21, 1966